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Protection of Minorities
Forty-eighth session
Item 14 of the provisional agenda

DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Protection of the heritage of indigenous people

Supplementary report of the Special-Rapporteur, Mrs. Erica-Irene Daes, submitted pursuant to Sub-Commission resolution 1995/40 and Commission on Human Rights resolution 1996/63

CONTENTS

	Paragraphs	Page
Introduction	1 - 8	2
I. SUMMARY AND ANALYSIS OF SUBSTANTIVE COMMENTS	9 - 30	3
II. RELEVANT ASPECTS OF RECENT ENVIRONMENTAL TREATIES	31 - 45	7
III. IMPLICATIONS OF RECENT TRADE AGREEMENTS	46 - 51	10
IV. ADDITIONAL CONCLUSIONS AND RECOMMENDATIONS	52 - 58	12

GE.96-13032 (E)

Introduction

1. In accordance with Sub-Commission resolution 1993/44 of 26 August 1993, and Commission on Human Rights decision 1994/105 of 4 March 1994, the Special Rapporteur submitted a preliminary report on protection of the heritage of indigenous people (E/CN.4/Sub.2/1994/31) to the Sub-Commission at its forty-sixth session, including draft guidelines and principles.

2. As requested by the Sub-Commission in its resolution 1994/48 of 26 August 1994, the Special Rapporteur submitted her final report (E/CN.4/Sub.2/1995/26) to the Sub-Commission at its forty-seventh session, reflecting the comments which had been made by Governments, intergovernmental and non-governmental organizations, as well as by organizations of indigenous people.

3. The Sub-Commission, in its resolution 1995/40 of 25 August 1995, endorsed by Commission resolution 1996/63 of 23 April 1996, requested the Special Rapporteur to prepare a supplementary report taking account of additional comments and information received from Governments, intergovernmental and non-governmental organizations, or from organizations of indigenous people, as well as any relevant activities undertaken in other forums, and the relevant provisions of international instruments relating to the protection of the global environment.

4. The Special Rapporteur has received additional comments from the Governments of Canada and New Zealand, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the World Intellectual Property Organization (WIPO), and from two organizations of indigenous people, the International Indian Treaty Council and Movimiento "Tupay Katari".

5. It will be recalled that in response to an earlier communication, the World Intellectual Property Organization (WIPO) maintained that the activities of WIPO did not include the question of the protection of the heritage of indigenous peoples, and requested that references to WIPO be deleted from the draft principles and guidelines prepared by the Special Rapporteur. The Special Rapporteur again invited WIPO to comment on her final report, and was pleased to learn that, subject to the approval of the WIPO Governing Body which will meet in September 1996, WIPO now foresees organizing an international symposium on the preservation and legal protection of folklore, probably early in 1997, in cooperation with UNESCO.

6. In a letter dated 27 February 1996, the World Trade Organization stated that it "has not undertaken any activity related to this issue, which is not within its area of responsibility, and we therefore have no contribution to offer".

7. UNESCO advised the Special Rapporteur that it had established an intersectoral task force to deal with matters concerning indigenous peoples, coordinated by Mme. Lourdes Arizpe, UNESCO Assistant Director-General for Culture. UNESCO had moreover arranged to bring the final report of the Special Rapporteur to the attention of the ninth session of the

Intergovernmental Committee for the Promotion of the Return of Cultural Property to its Countries of Origin or its Restitution in Case of Illicit Appropriation, to be convened in Paris from 16 to 19 September 1996.

8. UNESCO furthermore proposed that it would be the appropriate body to undertake the "comprehensive annual report" described in paragraph 55 of the draft principles and guidelines contained in the final report of the Special Rapporteur. It could be contained in a special chapter in the biennial reports on the state of culture, which UNESCO planned to prepare in the future.

I. SUMMARY AND ANALYSIS OF SUBSTANTIVE COMMENTS

Comments received from Governments

9. The Government of New Zealand described the final report prepared by the Special Rapporteur as a helpful contribution to alleviating the concerns of indigenous people over the protection of their cultural heritage, an objective which that Government could support. Future work could best be directed to an evaluation of the existing international machinery for the protection of intellectual and cultural property. A preliminary study along those lines, currently being undertaken in New Zealand, indicated that the current legal framework presented problems, such as the requirement of "novelty", an emphasis on individual owners rather than collective ownership, and limited periods of protection.

10. The Government of Canada indicated that it supported in principle the efforts of the Special Rapporteur to develop ways of strengthening respect for the heritage of indigenous people. They could include the use of education to help preserve, protect and promote the languages, cultures and heritage of indigenous people, and the use of distinctive labels or marks to ensure the authenticity of indigenous artistic and literary works. The Government of Canada emphasized the importance of consulting with indigenous communities, scholars, scientists, business and industry before adopting any specific national measures. Priority should be given to examining ways of using existing national laws more effectively.

11. According to the Government of Canada, careful thought should be given to striking a balance between the interests of indigenous people and artistic freedom. Moreover, allowing indigenous people to revoke their consent to the use of their heritage, or to reassert rights to elements of their heritage which have already passed into widespread public use, could have an adverse impact on science, medicine and art. The financial implications of imposing additional responsibilities on the United Nations system should also be considered.

12. The Governments of Canada and New Zealand noted that the possible application of intellectual property law to the heritage of indigenous people was already under study by a number of intergovernmental bodies, including the working group established by the Commission on Human Rights in its resolution 1995/32, and it would seem prudent to await the outcome of those deliberations. In the view of the Government of Canada, the working group of

the Commission was also the proper forum to address issues such as the right to self-determination, and the right of indigenous people to their traditional "territories".

13. The Special Rapporteur is grateful for the serious attention given to her work by the Governments of Canada and New Zealand. The remarks of both Governments have contributed significantly to an understanding of the complex institutional and legal issues which must be addressed, before the heritage of indigenous people can be protected fully.

14. Although the Special Rapporteur looks forward with great interest to the results of the preliminary study to which the Government of New Zealand referred, and appreciates the suggestions for her further work made by the Government of Canada, she would like to draw the attention of those Governments to the critical analysis of existing intellectual property machinery contained in her own study (E/CN.4/Sub.2/1993/28, paras. 128-148). She would be grateful for government responses to the specific conclusions of law and policy which she has already placed before them.

15. The Special Rapporteur is unable to agree that efforts to develop standards for protecting the heritage of indigenous people must await the outcome of discussions in other forums. As noted above, WIPO and WTO have been reluctant to claim any special competence in this field. As described in section II below, intergovernmental bodies concerned with the environment are at a far more preliminary stage of analysis of the rights of indigenous people, than the Sub-Commission. It is difficult to understand why the Sub-Commission should suspend its efforts, rather than assuming a leadership role in relation to other bodies and organs of the international system.

16. There can be no doubt that the protection of cultural rights and intellectual property fall within the mandate of the Sub-Commission and the Commission on Human Rights in the light of article 27 of the Universal Declaration of Human Rights, article 15 of the International Covenant on Economic, Social and Cultural Rights and, in the view of the Special Rapporteur, article 17 of the International Covenant on Civil and Political Rights. Accordingly, it is proper for the Sub-Commission to advise the Commission as to how these universally recognized principles of human rights should best be interpreted and applied in particular contexts, such as the context of indigenous peoples. The Sub-Commission would naturally be wise to seek the cooperation of other interested United Nations bodies, as it has in the field of human rights and the environment, but its own judgement is not subordinate to the opinions of expert bodies in other fields.

17. Similarly, the Special Rapporteur does not understand the need to await the review of the draft declaration on the rights of indigenous peoples by the working group established in accordance with Commission resolution 1995/32. While articles 12 and 29 of the draft declaration address the heritage of indigenous peoples, they do so in very general terms, and the Special Rapporteur believes that the working group of the Commission would benefit from the advice of the Sub-Commission as to the practical implications of these draft articles. As an observer at the first session of the working group, furthermore, the Special Rapporteur did not hear any objections to the basic principles contained in either draft article.

18. In any event, articles 12 and 29 of the draft declaration on the rights of indigenous peoples reflect general principles which have already been adopted in a number of recent conventions for the protection of the environment, as described in section II, below. In the opinion of the Special Rapporteur, the fundamental right of indigenous peoples to the protection and enjoyment of their heritage has already been given international recognition, both in the human rights instruments cited in paragraph 14 above, and in conventions on the environment that make express references to indigenous communities. For these reasons, the Special Rapporteur believes that there is an ample legal basis for the Sub-Commission to proceed with the adoption of guidelines relating to the implementation of that fundamental right.

19. With respect to the important substantive comments on the revised draft guidelines made by the Government of Canada, summarized above in paragraph 9, the Special Rapporteur observes, first, that the issue of artistic freedom and freedom of expression was addressed in her final report (E/CN.4/Sub.2/1995/26, paras. 21-22), which explained that the same kind of balance must be struck with respect to the principles of privacy, security of home and family and private property. Artistic freedom and freedom of expression are not absolute or unlimited rights, either in national legal systems, or under international human rights instruments. Regarding the revocability of consent, the Special Rapporteur conceives that draft principles 5 and 9 have the effect of creating a presumption against the extinguishing of the rights of indigenous peoples to elements of their heritage. If informed consent has demonstrably been given, it would be revocable in accordance with the explicit terms of the agreement, as in the case of any other contract.

20. On the issue of retroactivity, the effect of the draft principles and guidelines would not be the automatic nullification of every past consent by indigenous peoples, but rather to subject previous consent to careful scrutiny. If a museum argued that it had obtained a sacred object or artifact with the informed consent of the indigenous people concerned, for example, the existence of consent would become an issue of fact and the museum would naturally be entitled to defend its own position. The Special Rapporteur trusts that the Government of Canada was not concerned, when it referred to retroactivity, with compelling museums or other institutions to return materials which were acquired in the past by force, fraud, or deception.

Comments made by specialized agencies

21. UNESCO expressed concern at the possible adverse consequences of the compilation of a confidential list of sacred sites, and suggested that the recommendation of the Special Rapporteur in that regard should be studied thoroughly. The Special Rapporteur would welcome such a study in collaboration with UNESCO, with the participation of experts chosen by indigenous peoples, as well as experts familiar with the schemes for the protection of sacred sites in Australia and the United States to which she referred in her original study. The Special Rapporteur also notes in this regard that the University of Manitoba (Canada) will convene a special conference on sacred sites from 24 to 26 October 1996 in Winnipeg, with nearly 30 indigenous and academic experts from North America, New Zealand and Australia.

22. UNESCO referred to the Convention on Stolen or Illegally Exported Cultural Objects 1995, adopted by the International Institute for the Unification of Private Law (UNIDROIT). During the negotiation of the text of that instrument, according to UNESCO, those States which had major collections of artworks and cultural artifacts conditioned their participation on the understanding that the Convention would not have a retroactive effect. The special circumstances of indigenous people might justify different treatment in that respect, but any text should be preceded by careful study and expert preparation.

Comments received from indigenous peoples

23. The Movimiento "Tupay Katari" proposed the following additions to the draft guidelines and principles:

> "Indigenous people have the right to effective legal protection of their intellectual property and folklore against any illicit use, or national or international piracy of their material culture, as well as any imitations, distortions, or adulteration of their traditional indigenous artistic heritage.
>
> "In accordance with the Model Treaty on the Protection of Expressions of Folklore against Illicit Exploitation, which was elaborated by UNESCO and WIPO, States recognize as the permanent traditional artistic heritage of indigenous communities, the body of artistic works created within indigenous territories by anonymous authors, and transmitted from generation to generation. The legal protection granted by this Declaration applies to:
>
> (1) Oral expressions such as folktales, legends, poetry and riddles;
>
> (2) Musical expressions such as songs and instrumental folk music;
>
> (3) Physical expressions such as folk dances, plays and ceremonies;
>
> (4) Tangible expressions such as drawings, paintings, sculptures, pottery, woodwork, jewelry, and basketry;
>
> (5) Musical instruments and architectural works".

24. The treaty to which the Movimiento "Tupay Katari" refers is found in the report of the Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property, convened in 1984 by UNESCO and WIPO. 1/ It should be noted that this instrument has not been adopted or come into force, although it is extremely useful as a source of ideas for legal principles and machinery, and indeed was one of the sources used by the Special Rapporteur in preparing her study.

25. The Special Rapporteur is extremely grateful for the suggestions made by the Movimiento "Tupay Katari," and will give them her careful consideration in any further revision of the draft guidelines.

26. The International Indian Treaty Council informed the Special Rapporteur about its efforts to collaborate with the Everhart Museum, in Scranton, Pennsylvania, United States of America, in returning the mummified remains of an indigenous person to Peru and other human remains to Ecuador.

27. The Special Rapporteur notes that in May 1996, there were reports in The New York Times that the mummified remains of another indigenous person, recently unearthed in Peru, had in fact been placed on display at the offices of the National Geographic Society in Washington, D.C., over the protests of indigenous people and scholars in Peru.

Other relevant information received

28. The Beijing Declaration of Indigenous Women, issued by all of the indigenous women attending the NGO Forum at the Fourth World Conference on Women, demands that the World Trade Organization recognize the intellectual and cultural rights of indigenous peoples, and opposes the privatization, commoditization or commercialization of the heritage of indigenous peoples. The Declaration also calls for a prohibition of the patenting of life forms, and for the condemnation and cessation of the Human Genome Diversity Project.

29. The Special Rapporteur has previously referred to the Declaration adopted by the World Conference on Indigenous Peoples on Territory, Environment and Development, held at Kari-Oca Village, Brazil from 25 to 31 May 1992. The Kari-Oca Declaration demands, inter-alia, the return of the human remains and artifacts of indigenous peoples; the protection of sacred and ceremonial sites under national and international legal instruments; the protection of indigenous languages; respect for the right of indigenous peoples to control tourism; and recognition that traditional knowledge cannot be separated from control of territories.

30. The Special Rapporteur would also like to draw special attention to the Manila Declaration on the World Decade for Cultural Development adopted by participants in the International Festival and Conference on Indigenous and Traditional Cultures held in Manila, Philippines, from 22 to 27 November 1988. The Manila Declaration recognizes the right of indigenous communities to preserve and develop their own "cultural traditions", and to receive protection for their traditional cultural expressions from "exploitation or debasement". The participants also called for the documentation of the arts, cultures and customary laws of the indigenous communities in the Philippines, and for the creation of a special national commission to authenticate such documentation in cooperation with indigenous leaders.

II. RELEVANT ASPECTS OF RECENT ENVIRONMENTAL TREATIES

31. In her study, the Special Rapporteur referred to the recognition, by the United Nations Conference on Environment and Development, of a need to protect the traditional ecological knowledge and conservation practices of indigenous peoples. 2/ This need has now been addressed in several major conventions on

the protection of the global environment, albeit in terms considerably more general than the final report of the Special Rapporteur. There now exists a strong basis, in international conventional law, for concrete measures at the international, regional and national levels, to protect the heritage of indigenous peoples, in particular the economic, social, cultural, and spiritual relationships which exist between indigenous peoples and their ancestral territories and resources.

Convention on Biological Diversity

32. The Convention on Biological Diversity was opened for signature at the United Nations Conference on Environment and Development on 5 June 1992, and entered into force on 29 December 1993. The Convention has thus far been ratified by 134 States. Implementation is entrusted to the Executive Secretary of the Convention, under the direction of the Conference of the Parties. The Executive Secretary is serviced by the United Nations Environment Programme (UNEP), which has established a special office in Montreal for this purpose.

33. Article 8 (j) of the Convention provides that, subject to national legislation, each State Party shall:

> "... respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices".

34. Article 10 (c) of the Convention provides, furthermore, that each State Party shall "protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements".

35. In its decision II/12, the Second Conference of the Parties, held from 6 to 17 November 1995, requested the Executive Secretary to explore "the relationship between the objectives of the Convention on Biological Diversity and the TRIPs [Trade-Related Intellectual Property Rights] Agreement" in cooperation with the World Trade Organization and in consultation with "all stakeholders, in particular the private sector and indigenous and local communities". Particular attention should be given to:

> "exploring the relationship between intellectual property rights and the preservation and maintenance of traditional knowledge and practices of indigenous and local communities and the possible role of intellectual property rights in encouraging the equitable sharing of benefits arising from such knowledge and practices".

Convention on Desertification

36. The United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in

Africa, was opened for signature on 14 and 15 October 1994. Article 17.1 (c) of the Convention requires State Parties to respect, protect and utilize traditional and local knowledge and conservational practices, in terms that are similar to article 8 (j) of the Convention on Biological Diversity.

37. In particular, article 18.2 of the Convention on Desertification commits State Parties to compile information on traditional knowledge and practices, with the participation of local populations; to promote the integration of traditional knowledge with modern technologies; and to ensure that local populations benefit directly, and equitably, from any dissemination or commercial development of their knowledge.

Intergovernmental Panel on Forests

38. The Commission on Sustainable Development was established, inter-alia, to monitor global progress in the implementation of the principles and programme of action adopted by the United Nations Conference on Environment and Development. 3/

39. In its decision 1995/226 the Economic and Social Council approved the establishment of an open-ended, ad hoc Intergovernmental Panel on Forests (IPF), under the supervision of the Commission on Sustainable Development, to pursue a consensus on the conservation and sustainable development of forests. At its first session, held from 11 to 15 September 1995, IPF adopted programme element 1.3 of its programme of work:

> "Consistent with the terms of the Convention on Biological Diversity, encourage countries to consider ways and means for the effective protection and use of traditional forest-related knowledge, innovations and practices of forest-dwellers, indigenous people and local communities, as well as fair and equitable sharing of benefits arising from such knowledge, innovations and practices".

40. In its decision II/9, the Second Conference of the Parties to the Convention on Biological Diversity requested the Executive Secretary of the Convention to "provide advice and information pertaining to the relationship between indigenous and local communities and forests" to IPF. The Executive Secretary issued a progress report in January 1996, entitled "Indigenous and local communities and forests", which in paragraph 12, underscores the emergence of scientific evidence that, inter-alia:

(a) The language, culture and knowledge of indigenous and local communities are disappearing at alarming rates;

(b) Many presumed "natural" ecosystems or "wilderness" areas are in fact "human or cultural landscapes" resulting from millennial interactions with forest-dwellers;

(c) Traditional knowledge is complex, sophisticated, and critically relevant to understanding how to conserve forest ecosystems and to use them sustainably.

41. The progress report of the Executive Secretary concluded that the protection and utilization of traditional knowledge would depend on the support given to indigenous peoples to document, evaluate and utilize their own systems of knowledge (para. 15). It also concluded that recognition of the "rights" of indigenous people to their traditional knowledge "would enable commitments made by countries under human rights conventions, covenants and agreements to be harmonized at the national level with international commitments on environment, development, and trade" (para. 14).

42. The above-mentioned report was considered at the second session of IPF, held from 11 to 22 March 1996 in Geneva, together with a background report prepared at the request of IPF by the Secretary-General of the United Nations. 4/ IPF decided to pursue, at its third session, to be held from 9 to 20 September 1996 in Geneva, a substantive discussion of:

> "Ways and means to ensure effective protection of indigenous rights and payment of royalties on intellectual property rights in the context of national legislation, and to ensure the fair and equitable sharing of benefits, involving local communities and forest dwellers, including ways to determine clearly which individuals belonged to which group". 5/

43. The progress report of the Executive Secretary of the Convention on Biological Diversity report will also be considered at the Third Meeting of the Parties to the Convention, to be held from 4 to 15 November 1996 at Buenos Aires.

Plant genetic resources

44. The Commission on Genetic Resources for Food and Agriculture of the United Nations Food and Agriculture Organization (FAO) is engaged in drafting a Global Plan of Action, and an International Undertaking, regarding the conservation and utilization of plant genetic diversity. The second extraordinary session of the Commission (22-27 April 1996) discussed, inter alia, the role of indigenous peoples and communities in the in situ conservation of plant genetic diversity. The Legal Counsel for FAO advised the Commission to harmonize its drafting with the relevant provisions of the Convention on Biological Diversity. A third extraordinary session of the Commission is planned for December 1996.

45. The role of indigenous peoples in conserving genetic resources is likely to be discussed further at the Fourth International Technical Conference on Plant Genetic Resources, to be held from 17 to 23 June 1996 in Leipzig.

III. IMPLICATIONS OF RECENT TRADE AGREEMENTS

46. Adopted on 15 April 1994, the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations created the World Trade Organization (WTO). The Final Act also includes an Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs"). Each Member State of the WTO must accord to the nationals of other Members, treatment with respect to the protection of intellectual property that is no less favourable than that

it accords to its own nationals (art.3). The Agreement moreover fixes certain minimum levels of protection for patents, industrial designs and other forms of intellectual property.

47. Member States may continue to provide "more extensive protection than is required by this Agreement" in national legislation, "provided that such protection does not contravene the provisions of this Agreement" (art. 1.1). Member States also retain full authority to make laws they "deem necessary" to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development" (art. 8).

48. In accordance with article 27 of the Agreement, State Members may furthermore deny patents to:

> "inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect ordre public or morality, including to protect human, animal or plant life or health or to avoid serious prejudice to the environment;"
>
> "diagnostic, therapeutic and surgical methods for the treatment of humans or animals;" and
>
> "plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes," provided that some form of legal protection is extended to plant varieties.

49. In the opinion of the Special Rapporteur, articles 1 and 8 of the TRIPs Agreement permit Member States to give greater protection to the heritage of indigenous peoples, under their national legislation, than they are required to give to intellectual property generally - provided that they afford the same special protection to indigenous peoples who are nationals of other States. Moreover, article 27 appears to permit Member States, if they so wish, to exclude the traditional ecological and medical knowledge of indigenous peoples from patentability. Hence States could implement the Principles and Guidelines for Protection of the Heritage of Indigenous Peoples, consistent with their obligations under the TRIPs Agreement.

50. The Special Rapporteur would like to draw particular attention to article 39.2 of the TRIPs Agreement:

> "Natural and legal persons shall have the possibility of preventing information lawfully within their control from being disclosed to, acquired by, or used by others without their consent in a manner contrary to honest commercial practices as long as such information:
>
> (a) is secret in the sense that it is not, as a body or in the precise configuration of assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(b) has commercial value because it is secret; and

(c) has been subject to reasonable steps under the circumstances, by the person lawfully in control of the information, to keep it secret."

51. All Member States must accordingly adopt laws for the protection of information which is undisclosed, and has commercial value, even if it is not eligible for copyright or patent protection. This provision of the TRIPs Agreement is broader than the concepts of "trade secrets" and "know-how", which the Special Rapporteur discussed in her original study. It is broad enough to cover most of the teachings, ceremonies, songs, dances and designs that indigenous peoples consider sacred and confidential and are currently threatened by commercial exploitation. The Special Rapporteur is therefore drawn to the conclusion that States Members of the WTO are required to provide protection, under national legislation, for those elements of the heritage of indigenous peoples which the peoples concerned choose to remain confidential.

IV. ADDITIONAL CONCLUSION AND RECOMMENDATIONS

52. For the reasons outlined above, the Special Rapporteur concludes that the measures she has proposed for the protection of the heritage of indigenous peoples are permitted, and to a large extent required by recently-adopted international instruments in the fields of trade and the environment, in particular the Convention on Biological Diversity and the Agreement on Trade-Related Intellectual Property Rights.

53. In this regard, the Special Rapporteur underscores the conclusion of the Executive Secretary of the Convention on Biological Diversity, quoted above (para. 37), that recognizing the rights of indigenous people to their traditional knowledge is needed to reconcile existing international instruments in the fields of trade, the environment and human rights.

54. The Special Rapporteur welcomes the decision of WIPO to organize, in cooperation with UNESCO, an international symposium on preservation and legal protection of folklore, and expresses the hope that she will be authorized to participate formally in the symposium in her capacity as Special Rapporteur and as a representative of the Sub-Commission.

55. The Special Rapporteur also welcomes the proposal by UNESCO to begin to report biennially on the state of protection of the heritage of indigenous peoples worldwide. She respectfully recommends that the UNESCO intersectoral task force on indigenous peoples convene, at the earliest possible opportunity, a technical conference with indigenous educators, scientists and artists, to define the methodology that will be used to collect and evaluate information for future UNESCO reports.

56. The Special Rapporteur is greatly encouraged by the high priority given to protection of the traditional knowledge of indigenous peoples by the Parties to the Convention on Biological Diversity, and welcomes the technical work that is being undertaken by the Executive Secretary of the Convention. She respectfully requests the Parties to consider, as a matter of urgency,

providing the Executive Secretary with funding to enter into research collaboration with educational and scientific institutions that work with and are accountable to indigenous peoples and communities.

57. As the present supplemental report makes clear, parallel efforts to reach an intergovernmental consensus on protection of the heritage of indigenous peoples are under way in several different United Nations organs and specialized agencies. There is an obvious and urgent need for communication and coordination to ensure consistent and mutually reinforcing results. A possible solution would be for a member of the Working Group on Indigenous Populations to be entrusted, with the approval of the Economic and Social Council, with a continuing mandate to exchange information with all parts of the United Nations system concerned with these issues, to facilitate cooperation and coordination, to promote the greatest level of participation by indigenous people in these efforts, and to report, as appropriate, through the Sub-Commission and the Commission to the Economic and Social Council.

58. The full and effective participation of indigenous people in the work of all relevant intergovernmental bodies is absolutely essential. As the number of forums concerned with these issues grows, however, the ability of indigenous organizations and communities to bear the costs of regular, effective participation will continue to decline. States must give urgent and serious consideration to providing special funds for the participation of indigenous people in relevant international meetings, in particular those meetings organized under the auspices of the Commission on Sustainable Development, the Conferences of Parties to the Convention on Biological Diversity, and UNESCO.

Notes

1/ UNESCO/WIPO/FOLK/GEI.1/2 (19 October 1984).

2/ E/CN.4/Sub.2/1993/28, para. 151; A/CONF.151/26/Rev.1 (Vol. I), paras. 15.4 (g), 16.7 (b), 16.39 (a), 17.75 (b), 17.82 (c) and 26.4 (b).

3/ General Assembly resolution 47/191 of 22 December 1992, para. 3 (a).

4/ E/CN.17/IPF/1996/9.

5/ "Report of the Ad Hoc Intergovernmental Panel on Forests on its second session", E/CN.17/1996/24, para. 89 (f).

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Forty-eighth session
Item 14 of the agenda

DISCRIMINATION AGAINST INDIGENOUS PEOPLES

Study on treaties, agreements and other constructive arrangements between States and indigenous populations

Third progress report submitted by Mr. Miguel Alfonso Martínez, Special Rapporteur

CONTENTS

		Paragraphs	Page
Introduction		1 - 11	2
I.	SOME GENERAL CONSIDERATIONS	12 - 26	3
II.	NORTH AMERICA: THE BRITISH COLONIZERS AND THEIR SUCCESSORS	27 - 115	6
III.	CENTRAL AMERICA: SPANISH COLONIALISM (VARIANT I)	116 - 144	23
IV.	THE SOUTHERN CONE: SPANISH COLONIALISM (VARIANT II)	145 - 170	27
V.	NORTHERN EUROPE: THE LIMITATIONS OF A "CONSTRUCTIVE ARRANGEMENT"	171 - 209	31

GE.96-13444 (E)

Introduction

1. In its decision 1995/118 of 24 August 1995, the Sub-Commission on Prevention of Discrimination and Protection of Minorities requested the Special Rapporteur to submit to the Working Group on Indigenous Populations at its fourteenth session, and to the Sub-Commission at its forty-eighth session (1996), his third progress report on the present Study.

2. In its decision 1996/109 of 19 April 1996, the Commission on Human Rights endorsed that request and, at the same time, asked the Economic and Social Council also to endorse such request. In its decision 1996/293 of 24 July 1996, the Council did so.

3. The present report is submitted for the consideration of the Working Group, as well as that of the Sub-Commission, in accordance with the above-mentioned decisions of the three bodies referred to. In preparing this report, the Special Rapporteur has taken into account, to the degree possible, the observations and suggestions made to him both by his colleagues in the Working Group and the Sub-Commission, and by observer delegations - of Governments and indigenous peoples alike - in the most recent discussions regarding his Study.

4. It must be stressed, in regard to the contents of the present third (and final) progress report and the Special Rapporteur's objectives in it, that the bulk of the data on which it is based had to come from the extensive research done in 1993, 1994 and early 1995 by both the Special Rapporteur and his consultant.

5. Most unfortunately, it was not until early June of 1996 (when it was impossible to proceed with a thorough updating of the data) that the Centre for Human Rights could provide a contract (a single one-month retainership, at that) for the consultant, in order to secure the provision of "all the necessary assistance ... in particular, specialized research assistance ... required by the Special Rapporteur to continue ... his study ...", as requested by the Sub-Commission, the Commission and ECOSOC.

6. Obviously, it may well be that some minor aspects of the information gathered during those years and included in the present report do not entirely reflect the realities of mid-1996. In drafting his final report due in 1997, the Special Rapporteur will correct and update any shortcomings in this respect.

7. Also in connection with the contents this third progress report, it is worth recalling that the previous one (1995) included a chapter III, entitled "From the status of sovereign peoples to that of vassals, wards or assimilated or marginalized peoples." 1/

8. That chapter was devoted to analysing a broad group of situations relating to the historical evolution of the juridical status (or juridical situation) of a number of indigenous peoples, the immense majority of whom illustrate the painful reversal undergone by the original juridical condition

of sovereign entities which these people enjoyed at the start of their political and economic relations with other non-indigenous peoples from the time these arrived on the ancestral lands of the former.

9. Due to the limitations existing at the time - inter alia limits of space and time - the situations studied therein were restricted to a certain representative number of cases in just two regions, i.e. Asia/Oceania and Africa. Nevertheless, in that same document (para. 174), the Special Relator promised that "the evolution of the situation in other regions would be the object of analysis in a later report". (emphasis added)

10. The present report will analyse diverse cases that have been considered relevant to illustrate the diversity of causes and results of this common reversal in the regions of North America, Central/South America and Northern Europe.

11. Since the present report is the last progress report submitted by the Special Rapporteur, it will not have conclusions and recommendations pertaining directly to the analysis it contains. Such conclusions and recommendations relevant to the Study as a whole will be included in the final report due in 1997.

I. SOME GENERAL CONSIDERATIONS

12. Legal theory, as well as legal practices are of utmost relevance for this Study to understand in particular the transition of indigenous nations from well-documented conditions of full sovereignty to conditions of evident, generalized domestication. In this context, one cannot help but notice that, historically speaking, theory and practice have not always gone hand in hand in public international law. By "domestication", one has to understand the gradual transferral of the relations with indigenous nations from the realm of international law and diplomacy to that of municipal law.

13. The legal doctrine, especially since the mid-nineteenth century, has consistently denied indigenous peoples overseas their rights under international law. The process of domestication of indigenous peoples overseas was justified by their alleged lack of "civilization" 2/ and their alleged ignorance of the technical and cultural achievements of the West. In that manner, non-Western peoples tended to be placed outside the family of nations and were considered to have no international legal status and capacity: "barbarians have no right as a nation" according to John Stuart Mill. 3/

14. Nevertheless, the practice of (European) States expanding overseas (and that of many of their successors today) frequently departed from the doctrine, especially if one considers the long-standing European practice of making treaties with indigenous nations overseas. Thus, Christian Wolff's advocacy of the equality of all peoples as communities organized by law (whether codified or not) and thus as subjects of the law of nations, 4/ while marginal in relation to mainstream legal history, did find expression in State practice well into the nineteenth century.

15. The discrepancy between theory and practice of international law is well illustrated by the fact that the so-called "colonial treaties" were often not

included in treaty compilations (an exception being the first two volumes of Parry's Consolidated Treaty Series 5/) and only dealt with marginally in the principal modern works on legal history.

16. Regarding one of the geographical foci of the present report, that is, the Western hemisphere, domestication is the basic theme for assessing the evolution of the status of the indigenous peoples there.

17. Domestication has taken on different forms in various countries, including those under former British rule, such as the United States and Canada - both of which shall be dealt with more in detail below - as well as New Zealand (which, together with Australia, was already examined by the Special Rapporteur in his second progress report 6/).

18. In the case of the United States, relations with indigenous nations have been much influenced, among others, by the doctrine of native title established through a series of cases decided by the Supreme Court between 1810 and 1835 and profuse legislation enacted by the Congress. In Canada, the classic British principle of imperial policy, namely systematic extinguishment of aboriginal title through negotiated settlement, has found its contemporary application in the so-called comprehensive claims policy formulated in the early 1970s - and partially revised since - as a reaction to the notorious White Paper of 1969, whose implementation would have terminated the special status of the first nations in Canada. 7/

19. As far as the evolution of the status of indigenous peoples is concerned, the differences and similarities among these four countries raise a number of interesting questions regarding colonial law, some of which will be briefly mentioned at a later stage. They are the more interesting since they involve a notion of "legality" which appears to be the specific legacy of the British imperial tradition.

20. In a not-too-often-cited passage of his De la démocratie en Amérique, Alexis de Tocqueville - who witnessed Indian removal in the United States in the 1830s - expressed his views on this ethnic cleansing of the United States Southeast and other aspects of the young republic's Indian policy, in the following manner:

> "The Spaniards let their dogs loose on the Indians as if these were savage beasts; they pillage the New World as if it were a city taken by storm, pitilessly and sparing no one whatsoever. But one cannot destroy everything, fury hath its limits: the rest of the indigenous populations, those who escaped the massacres, finish by melding with their conquerors and adopting their religion and customs. Conversely, the behaviour of the Americans from the United States vis-à-vis the Indians is redolent of the purest devotion to [illegible]malities and legality. In view of the fact that the Indians continue to be in the state of savagery, the Americans do not interfere in their affairs, and treat them as independent peoples; they would not allow themselves to seize Indian lands without having previously acquired them by means of a contract. And if by any chance an Indian nation can no longer live on its own territory, [the Americans] fraternally take them by the hands and lead them to die outside the lands of their ancestors. The Spaniards, by means of unprecedented monstrosities which cover them with unforgivable shame, have been capable neither of annihilating the Indian race, nor of completely depriving [the Indians] of their rights. The Americans of the

United States have achieved both goals with marvellous ease; quietly, legally, philanthropically, without blood-letting, without flouting, in the eyes of the rest of the world, any of the great principles of morality. One would be incapable of destroying men in a fashion more in accordance with the laws of humanity." 8/ (emphasis added)

21. The principles of negotiation and compensation, as well as the doctrine of native title seem to be almost totally absent from Spanish colonial policy, "legitimized" by conquest.

22. Nevertheless, the secondary literature and other available documents - including submissions made by indigenous organizations to the United Nations Working Group on Indigenous Populations - tell a different tale: there is a history of treaty-making, especially well documented for the peripheral zones of the Spanish colonial empire in the Americas, including parts of Central America and the so-called Cono Sur (Araucania, Chaco, Patagonia). Furthermore, in areas where Spain had to compete with other European powers such as England and France, she was often compelled to make treaties with indigenous nations. This applies, for example, to the southern part of North America (Nueva Vizcaya) and Nicaragua where the British had entered into treaties with indigenous peoples.

23. In those parts of the present report devoted to the areas formerly under British colonial rule, legal and juridical action growing out of the treaty relationship will be analysed in extenso. The Special Rapporteur also considered some aspects of so-called native law, that is, municipal legal provisions regarding the status of indigenous peoples (and not, as the term might imply, autochthonous legal systems, which have indeed been consistently neglected and underrated by the legal establishment 9/) in the countries retained for study.

24. As mentioned before, the situations in colonial Spanish America (as well as in Portuguese America) differed markedly from those in the regions which had come under the influence of other European powers. Considerable scholarship exists on the history of Central and South America, but for the moment, only a cursory assessment of the secondary sources has been possible. Therefore, more time will be devoted in the present report, rather, to treaties and agreements, including their overall historical and institutional context.

25. The comparability of Latin American indigenous treaties and agreements with their North American equivalents has been a subject open to question. For instance, is a parlamento a treaty? The Chilean historian José Bengoa (personal communication) seems to think that because of their colonial nature, parlamentos with the Mapuche are not comparable to Indian treaties in North America. This view reflects a State-centric view of treaties, which, incidentally, appears to be shared by many Latin American scholars.

26. The finer points of this issue could naturally not be addressed in the preliminary approach presented in the following chapters. On the other hand, it seems definitely worthwhile to start establishing the historical basis for a treaty analysis related to the Latin American situation.

II. NORTH AMERICA: THE BRITISH COLONIZERS AND THEIR SUCCESSORS

27. As noted in previous reports, historiography has established that the first Europeans to arrive in North America applied the doctrine of sovereignty to the indigenous nations they encountered: they admitted that these nations were governments with the power to manage their own affairs in their own territories, and they made treaties with them to acquire land and to establish boundaries between their settlements and the indigenous territories.

28. After the French and Indian war (1755-1763), which established British supremacy in North America, King George III reconfirmed the boundaries between the colonies and the indigenous territories in the Royal Proclamation of 1763, which also spelt out clearly that the indigenous nations had an inalienable right to their lands, both within and outside the territory claimed for European colonization.

29. This recognition of indigenous land rights was counteracted by another objective pursued by the British Crown, namely to assert control over the American colonies. This was a decisive factor, eventually, of the revolutionary wars and American independence. Thus, the monopoly of treating with Indian nations and control over land purchases and land speculation became one of the central concerns of the British Government.

30. Until the adoption of the American Constitution in 1787, the United States governed itself under the Articles of Confederation of 1777 10/. Three sections of the Articles addressed Indian affairs. 11/ Also, a policy statement of October 1783 committed Congress to obtain land cessions through treaties and to establish mutually agreed boundaries with the Indian nations. At that time, the United States was still far from encompassing its present-day territory.

31. The legislative right proviso pitted Congress against frontier States seeking to acquire Indian lands without authorization from Congress in order to enlarge their territories. Eventually agreement was reached on the principle that the proviso in question gave States a right of pre-emption which was subject, however, to Congress's supreme regulatory power.

32. Until the signing of the 1787 United States Constitution, the main issue was for Congress to make peace with the Indian nations and to reach an understanding with them that they should only treat with the federal Government and no other (European) power or individual American State.

33. For example, in violation of Article IX, paragraph 4, of the Articles of Confederation, Georgia made separate treaties with Indian nations within its boundaries, for example in 1785 with the Creeks at Galphinton. This compact declared that the Indians within Georgia's limits "have been, and now are, members of the [State], since the day and date of the constitution of that State". 12/

34. Georgia had been coveting the lands of the Creeks and Cherokees for years. In this instance, Congress tried to assert control over Indian affairs by instructing its treaty commissioners to disapprove all prior State land cession treaties with Indians unless such treaties were consistent with federal principles. The State of Georgia argued on the basis of extensive

territorial claims derived from royal charters that the legal rights proviso of the Articles of Confederation preserved its right to deal separately with the Indians located within the boundaries of the charter claims.

35. Congress had concluded treaties with the Cherokees (1785, 7 Stat. 18), the Choctaws (1786, 7 Stat. 21), and the Chickasaws (1786, 7 Stat. 24). All three compacts acknowledged the sovereignty of the Indian signatories, for instance in the field of criminal jurisdiction; but all three were repeatedly violated by the States. But Congress did not have the financial and military means to enforce the provisions of these treaties.

36. On the eve of the Constitutional Convention, the United States Government feared the possibility of an Indian war and alliances between Indian nations and other powers, particularly Britain and Spain. In 1789, faced with Tecumseh's incipient confederation, the United States disavowed its intent to exercise the doctrine of conquest in the Northwest Ordinance: "The utmost good faith shall always be observed toward Indians; their land and property shall never be taken from them without their consent."

37. Under the Constitution of 1787, the administration of Indian relations became the sole responsibility of the federal Government. The ratification process of the new Constitution by the States also confirmed the framers' intent to give the federal Government exclusive authority to conduct relations with Indian nations. This is the initial meaning of the concept of "plenary power", referring to the securing by Congress of the entire constitutional power to govern commerce and treaty-making with Indian nations. The farmers' intentions are well illustrated by a number of early United States treaties with indigenous nations, e.g. that of 1778 with the Delawares which recognized Delaware sovereignty. 13/

38. According to Curtis Berkey, there is no indication that in its initial years Congress thought it had authority over the internal affairs of any Indian nation. Furthermore, the "modern conception of the status of Indian nations and the scope of congressional authority is radically different from the original understanding of the framers". 14/ This modern conception considers Congress's plenary power as virtually absolute - without constitutional restraint - to pass legislation affecting the indigenous nations without the latter's consent.

39. Two fundamental principles were established during the colonial and revolutionary period: that the United States could not lay claim to the territories occupied by Indian nations; and that the best way of dealing with these nations was through negotiation and treaty-making. The first principle is still valid today, since occupation is the main principle by which, in the United States, land ownership is being assessed; the second principle was abandoned through the Indian Appropriation Act of 1871 (infra).

40. The question remains in what manner a limited authority to manage the federal Government's relations with sovereign Indian nations has become unrestrained power over them. This shift of meaning is far from self-explanatory. Nevertheless, unrestrained powers over Indian nations tend to be assumed by the legal establishment. Hooker, for example, asserted that the "fundamental power over the Indian, both as an individual and as a tribal or other group, springs from the United States Constitution, which provides for the exercise of power by Congress and by the President ...". 15/

41. The question of the powers of Congress in dealing with indigenous nations are, in the words of Vine Deloria Jr., "assumed or implied" that is, not spelt out in the American Constitution. Deloria recalled that the power of war was never officially used against an Indian nation as a formal procedure. 16/ Rather, only a few specific acts fell under this power: after 1812, the United States made a number of peace treaties with the nations of the Plains (1815-1820); and in the 1860s, Congress authorized the abrogation of treaties with, and the withholding of annuities from, nations engaged in hostilities against the United States. As to the treaty-making power, it is assumed that the United States had little choice but to follow the practice set by other European nations. In the early days, treaty-making relied heavily on the executive branch. With the westward expansion of the settler frontier and the growing number of treaties made in the course of that expansion, the Senate became increasingly involved, especially via the ratification process. Finally, the power to regulate commerce is, in Deloria's view, "the heart and soul of modern constitutional law and the cornerstone of federal plenary powers in Indian affairs". 17/ Initially, Congress saw its responsibility in passing legislation to fulfil treaty obligations and to provide means to "civilize" the Indians (with the goal of assimilation), which is a decision of a purely political nature.

42. Legislation passed in the years 1785 to 1834 indicates that the federal Government thought it needed to control its own citizens in dealing with Indians - with one exception: the Civilization Act of 3 March 1819 (3 Stat. 516), which provided for the gradual assimilation of Indians into Euro-American society through education and agricultural assistance. 18/

43. Significant changes in the relations between the United States and indigenous nations were set off by the defeat of the British (allied with the north-western tribes under Tecumseh) in 1812. The Treaty of Ghent (1814) sanctioned the hegemony of the United States over the Indian nations of the interior, that is, outside of United States borders. From this period, the Indian nations no longer represented a military threat to the United States. Nevertheless, treaties continued to be concluded, but they were used gradually to extinguish indigenous land rights and to resettle Indian nations away from White settlements.

44. This segregationist policy was sanctioned by the Removal Act of 28 May 1830 (4 Stat. 411). Using the huge territory extending between the Mississippi River and the Rocky Mountains, acquired by the United States through the so-called Louisiana purchase under President Jefferson in 1803, it provided "for an exchange of land with any of the Indians residing in any of the States and territories and for their removal west of the river Mississippi" to make their lands available for European settlement. The idea was that Indians could only survive if they were separated from so-called civilized society, which meant their relocation in what used to be termed the "Great American Desert", an area which - at that time at least - held no particular interest for white settlement. Initially, the Act affected mainly the nations established east of the Mississippi: Creeks, Cherokees, Choctaws, Chickasaws and Seminoles, but many other Indian nations were relocated all through the nineteenth century and beyond.

45. For Deloria, the Removal Act meant "that the executive branch could use Indians in any way it wished to fulfil political promises to particular

constituencies", which implied a "misuse of the office of presidence" and also marked "the emergence of the legislative branch as the dominant actor in the formulation of Indian policy". 19/

46. The removal policy of the nineteenth century is still alive today. A recent large-scale removal issue involves some areas in the ancestral lands of the Hopi and Navajo nations in the United States southwest. The 1974 Navajo-Hopi Claims Settlement Act provides for the removal of 6,000 Navajo living on land assigned by Congress to the Hopis. Only a strong opposition from some sections of the Navajo population has impeded the full implementation of that decision (many Navajos have already vacated their areas because of the pressures brought against them by both White and indigenous authorities "elected" under non-indigenous legislation).

47. During an in situ research mission carried out in 1994 under the sponsorship of the International Indian Treaty Council, the Special Rapporteur was able to ascertain the state of economic destitution and mental stress under which the Navajo population destined to be forcibly relocated live today in their lands in Arizona (particularly in the Big Mountain area).

48. In fact, Indian removal was a clear precedent to the ethnic cleansing policies much in vogue in certain areas of central and eastern Europe after the collapse of "real socialism" in recent "post-modern" times.

49. In the early 1800s, the role of the courts was crucial in shaping the status of the indigenous peoples from the point of view of dominant Euro-American society. The five so-called Marshall cases - i.e. Fletcher v. Peck (1810), Johnson v. McIntosh (1823), Worcester v. Georgia (1832), Cherokee Nation v. Georgia (1834) and Mitchell v. U.S. (1835) - contributed significantly to the formulation of the concept of native title and inherent, albeit restricted, tribal sovereignty. This jurisprudence eventually established the status of the Indian nations in relation to the United States Government as colonial subjects. 20/

50. Although the ultimate purpose of the five cases in question was absolutely consistent, the reasons for judgement were not always the same. 21/ The basis for the Supreme Court's decisions unabashedly varied according to the political needs of the times and the direction of the winds blowing in the political arena of the fledgling republic.

51. In all five decisions, the United States had to be acknowledged as the dominant sovereign; to fail to do this would have been to question the legal title on which the United States rested - whatever one might think otherwise about the "original justice of the claim which has been successfully asserted". 22/ These decisions are perhaps one of the clearest examples of what legal scholars dealing with colonial or imperial issues were and are always ready to do: to bend the existing law (or create new legal theories and doctrines) to accommodate the needs of the powers that are.

52. In Fletcher v. Peck of 1810 (10 U.S. 87), Marshall held that States claiming lands west of the line of demarcation defined in the Royal Proclamation (1763) "owned" them, even if the Indian nations possessing these lands had never consented to cede them.

53. In Johnson v. McIntosh of 1823 (21 U.S. 98 Wheat. 543), Marshall opined that the United States enjoyed pre-eminent sovereignty over the territory claimed by virtue of the doctrine of discovery (with obvious "manifest destiny" overtones):

> "On the discovery of this immense continent, the great nations of Europe are eager to appropriate to themselves so much of it as they could respectively acquire ... The potentates of the Old World found no difficulty in convincing themselves that they made ample compensation to the inhabitants of the new, by bestowing on them civilization and Christianity ... So the Europeans agreed on a principle of law that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments."

As to the original inhabitants of these lands, they

> "... were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomever they pleased, was denied by the original fundamental principle that discovery gave exclusive title to those who made it."

On that basis, the Supreme Court held that United States courts could not recognize transfers of title to land from Indian nations to private individuals (the issue was whether a land title given by the Indians under British supervision at an open public sale was superior to a title derived from the United States through a sale by a designated federal land officer).

54. The Cherokee Nation cases - Cherokee Nation v. Georgia of 1831 (30 U.S. 5 Pet. 1) and Worcester v. Georgia of 1832 (31 U.S. 6 Pet. 551) - elaborate the notion of the "quasi-sovereignty of Indian nations: they are sovereign enough to enter into treaties with the purpose of ceding legal title to their territory, but they are not sovereign enough to function as independent political entities or, for that matter, to protect the remnants of their sovereignty".

55. In Cherokee Nation, actions filed by the Cherokees seeking to enjoin the State of Georgia from enforcing laws threatening tribal government and land holdings were dismissed by the Supreme Court for lack of jurisdiction. The Court held that Indian tribes were not foreign nations but "domestic dependent nations", for their territories were part of the United States. However, Chief Justice Marshall's concept of "domestic dependent nation" was based on the assumption that the dependency of Indian nations flowed from the treaty relationship. Marshall thus endorsed the principle of guardianship while upholding - to a certain extent - the principle of Indian sovereignty. Regarding, for instance, the protection provisions included in many treaties, self-declaration by a given Indian nation as being under the protection of the United States implied a consensual international protectorate status or alliance. It did not imply "trust title" and thus did not accord the United States Government authority to exercise exceptional powers over Indian property and Indian affairs.

56. In the same vein, in Worcester v. Georgia Marshall argued:

> "By various treaties, the Cherokees have placed themselves under the protection of the United States: they have agreed to trade with no other people, nor invoke the protection of any other sovereignty. But such engagements do not divest them of the right of self-government, nor destroy their capacity to enter into treaties or compacts." (emphasis added)

The Worcester case is generally considered to be the most important articulation of the doctrine of restricted tribal sovereignty and native title.

57. The Court held that assertion of jurisdiction by Georgia over the Cherokee nation was void. At the same time, the decision implied the precarious status of the Indian nations, considered as States but not foreign, considered as sovereign but also as wards of the federal Government. Marshall declared for the Court:

> "The Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial, with the single exception of that imposed by irresistible power, which excluded them from intercourse with any other European potentate than the first discoverer of the coast of the particular region claimed: and this was a restriction which those European potentates imposed on themselves, as well as on the Indians. The very term 'nation', so generally applied to them, means 'a people distict from others'. The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties. The words 'treaty' and 'nation' are words of our own language, selected in our diplomatic and legislative proceedings, by ourselves, having each a definite and well-understood meaning."

58. In Mitchell v. United States of 1835 (34 U.S. 711) the Court held that by concluding treaties with Indian nations, the European powers had waived all pretense to right by discovery or by conquest:

> "By thus holding treaties with these Indians, accepting of cessions from them with reservations, and establishing boundaries with them, the King waived all rights accruing by conquest or cession, and thus most solemnly acknowledged that the Indians had rights of property which they could cede or reserve."

59. A comprehensive statute enacted by Congress on 30 June 1834 (4 Stat. 729) summarized and updated all existing Indian federal law and generalized the concept of "Indian country"; it also established a first code of civil and criminal law applicable to the areas of conflict between Whites and Indians.

60. Eventually, Congress foreclosed the power of the executive branch to make treaties with Indians by a rider attached to the Indian Appropriations Act of 1871, by which Congress purported to meet its treaty obligations and other responsibilities vis-à-vis the Indian nations (25 U.S.C. 71). Deloria

characterizes the laws enacted after 1834 as an expression of the usurpation of power by the legislative. Thus Congress assumed plenary power in Indian affairs - an assumption confirmed repeatedly by the federal courts. 23/

61. Plenary powers have been invoked to justify the legal sources of federal control over Indian nations. The notion of plenary power signifies in this context the power to enact laws in derogation of, inter alia, the tribes' original political and territorial rights and treaty rights. The only legal source the United States federal Government relies on in its control over Indian lands and Indian affairs are its own congressional acts and court rulings. According to Vine Deloria Jr., "the only limitations placed on dealings with Indians are the perceptions of power held by the branches of the federal Government and the self-control exercised by the federal Government itself", but "American history demonstrates that there has been precious little self-restraint." 24/

62. The doctrine of plenary power in its second - absolute - sense is also tied up with a number of crucial Supreme court cases, namely Ex Parte Crow Dog (1883) and the subsequent Seven Major Crimes Act, followed by the rulings in United States v. Kagama (1886) and Lone Wolf v. Hitchcock (1903).

63. Ex Parte Crow Dog (109 U.S. 556) ruled that the United States had no jurisdictional authority to prosecute an Indian who had killed another Indian on the reservation. This ruling led to the Seven Major Crimes Act (18 U.S.C. 1153) enacted on 3 March 1885, which is the first legislation providing unilaterally for the extension of federal jurisdiction over Indian land, in this instance in certain criminal matters (these now include more than seven offences).

64. In 1886, United States v. Kagama (118 U.S. 375) challenged the Seven Major Crimes Act, while consolidating federal plenary power over Indians: Congress had an "incontrovertible right" to exercise its authority over Indians as it saw fit. The Court upheld the Act as lawful exercise of the power of Congress. In lieu of the commerce clause as a basis for justifying Congress's jurisdiction over Indian territories, the Court offered the notion of ownership, by the United States, of the country in which the Indian territories are located.

65. In 1903, Lone Wolf v. Hitchcock (187 U.S. 553) upheld the power of Congress to abrogate unilaterally Indian treaties as part of its plenary powers, even without the Indians' consent and without disturbing the force of the treaty itself:

> "In other words, the aspects of the treaties that vested land title in the United States would remain inviolate, while inconvenient obligations to pay for the land ceded - or preserve reservation areas - could be dispensed with at will." 25/

The Supreme Court declared furthermore that the taking and disposal of Indian property rights were political actions not reviewable in court, since they were undertaken in the Indians' "best interest". 26/

66. Building on the trusteeship idea, the federal Government has asserted that it holds trust title to all Indian lands, with Congress as the self-appointed trustee, and the Bureau of Indian Affairs (BIA) as the main administrative tool. For the BIA's principal role is the implementation of

federal legislation concerning indigenous nations. Apart from the Seven Major Crimes Act, such legislation includes notably the General Allotment Act or Dawes Severalty Act (25 U.S.C. 331) of 1887, which provided for the allotment of parcels of land to indigenous individuals. These individuals had to be registered with the BIA. Registration was governed by racist principles, on the basis of "blood quantum". Although a federally imposed policy, allotment was officially declared as "cessions in trust". 27/

67. The allotment policy, which entailed the loss of vast tracts of land, was repudiated in 1934 through the Indian Reorganization Act or "Wheeler-Howard Act" (25 U.S.C. 461-279); the practice of parcelling out Indian land was stopped, and some funds were made available to reacquire land previously "lost". However, the trust relationship itself was not questioned. On the other hand, the Indian Reorganization Act imposed a tribal council structure modeled on the business corporation, which was meant to replace traditional forms of government. 28/

68. Another development related to the "Indian New Deal" was the establishment of a claims procedure via the Indian Claims Commission Act of August 1946 (60 Stat. 1049). The Act was intended to remedy injustice especially for Indian nations which had suffered expropriation of their lands by the United States. It provided that the Court "hear and determine claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant". Some 600 land claims were filed by the 1951 deadline.

69. In order to file a claim, an Indian nation had to allege that the United States had taken its lands illegally, and seek monetary redress. However:

> "Since many large areas of land had not been formerly or formally ceded by the Indian nations, the effect of the work of the Indian Claims Commission was to retroactively transfer title to large tracts of land owned by the Indians to the United States by using the fictional device which asserted that the lands had been permanently lost. Deprived of the right to sue for title to their lands, the Indian nations were simply stripped of their legal rights for a pittance ... ." 29/

By and large, awards were calculated on the basis of the estimated price per acre at the time the land was taken. Moreover, expenditures made by United States for the benefit of an Indian nation could be offset against a money award to that nation.

70. While the United States has repeatedly asserted that it acts as trustee on behalf of the Indian claimants within the framework of the claims process, the federal Government actually weighs the "best interests" of the indigenous claimants against those of non-Indians: "in sum, the United States was busily casting a veneer - but not the reality - of legitimacy over many of its land acquisitions in North America". 30/

71. A relevant illustration is the case of the Western Shoshone, already described in the Special Rapporteur's first progress report. 31/ The Treaty of Ruby Valley (1863, 18 Stat. 689) between the Western Shoshone Nation

and the United States continues to be abrogated by actions of the United States Bureau of Land Management. The Special Rapporteur received comments calling for a number of corrections of the paragraphs mentioning this case. 32/

72. The "Indian New Deal" was reversed in turn by the Termination Act (House Concurrent Resolution 108 pronounced on 1 August 1953), which provided for the unilateral dissolution of indigenous nations. Termination implied the suspension of federal services and of federal recognition for over 100 tribes (some of which were restored to federal recognition in the 1970s, however). To legitimize this policy, the United States Government asserted it had the legal power to terminate unilaterally this relationship with the Indian tribes, since it represented "a gift" to the Indians.

73. Public Law 959 of 1956 (or Relocation Act) provided for job training for Indians in the cities and financing their moving there. In order to benefit from the programme, Indians had to sign an agreement that they would not return to live on the reservation. By the same token, federal funds for economic development on the reservations were reduced. By 1980, there was a "diaspora of Native Americans, with more than half of the 1.6 million Indians in the United States having been scattered to cities across the country". 33/

74. Among the vast number of legal and jurisprudential texts - whose quantity and complexity can hardly be summarized in the present report - some are particularly relevant for the treaty issue.

75. For example, the decision in Tee-Hit-Ton Indians v. United States of 1955 (348 U.S. 272) was the first Supreme Court ruling to uphold the extinguishment power of Indian title. It held that a community belonging to the Tlingit nation in Alaska could not claim aboriginal title to its territory occupied since time immemorial, for there was no treaty recognizing that title. According to Churchill and Morris, the decision "neatly finished the United States reversal of the 'discovery doctrine' principle concerning who conveys title to whom in North America and effectively gutted whatever was left of aboriginal rights in United States jurisprudence". In 1973, in McClanahan v. Arizona Tax Commission (411 U.S. 164), the Supreme Court opined that Indian sovereignty was a "mere 'legal fiction' conveying no real legal entitlements, but which might serve instead as a convenient 'backdrop' against which the meaning of treaties and other agreements might be read". Finally, Oliphant v. Suquamish Tribe of 1978 (435 U.S. 191) held that Indians had no inherent criminal jurisdiction over non-Indians living on the reservation. In the same vein, Duro v. Reina (110 St.C. 2053) of 1990 ruled that tribal jurisdiction only pertained to member Indians on each reservation. In 1982, Merrion v. Jicarilla Apache Tribe (102 S.Ct. 894) appeared to reassert tribal sovereignty through acknowledging indigenous rights to levy severance taxes on minerals extracted from reservation land. However, it has been argued that this ruling was consistent with "the Reagan administration's campaign to diminish federal funding to Indians, 'privatize' former areas of governmental operation, and 'encourage economic development of federal trust lands'", the taxes in question "being used to defray the cost of 'tribal selfgovernment ... and other programs'. In effect, the decision provided an incentive for Indians to 'cooperate' with transient extractive industries doing (or wishing to do) business on their land." 34/

76. The Alaska Native Claims Settlement Act of 1971 (43 U.S.C. 1601) is based on the same rationale. It was enacted shortly after the discovery of one of North America's largest oil deposits at Prudhoe Bay, in 1968 - a discovery that undoubtedly formed a major incentive for the federal Government to resolve the issue of land claims based on aboriginal rights in Alaska.

77. The 1867 Russian-American treaty of cession of Alaska - a cession obtained as such without indigenous consent - contained provisions obliging its signatories to obtain the consent of the indigenous peoples regarding any future interaction with them or any appropriation of their land. Furthermore, in 1884, Congress recognized as a matter of principle the territorial rights of the indigenous peoples in Alaska; this principle was reconfirmed in the Alaska Statehood Act of 1958 by which Alaska became the forty-ninth American State.

78. By the Alaska Native Claims Settlement Act (ANCSA), the indigenous nations were transformed into 13 regional and/or village corporations accommodated under State charters, with the purpose of promoting native businesses and a profitable use of the indigenous land base. By the same token, the indigenous holdings were turned into United States "domestic assets". The Act consigns 44 million acres and nearly US$ 1 billion as compensation for extinguishment of indigenous claims to the rest of Alaska.

79. The Alaska Native Review Commission, which was established on the initiative of the Inuit Circumpolar Conference, concluded that ANCSA has created considerable problems for indigenous communities. 35/ Takeover of indigenous land holdings by non-indigenous people was difficult to avoid. For this reason, one of the main recommendations of the Commission was the transfer of Alaskan indigenous land holdings to indigenous Governments that would be in a better position than corporations to protect indigenous lands and resources. 36/

80. Under the United States Constitution (1787), treaties - including treaties made with indigenous nations - are the supreme law of the land. For the indigenous peoples now living within the confines of the United States of America, the transition from well-documented conditions of full sovereignty to conditions of domestication has been accomplished mainly through the legislative process, grounded on the unilateral assumption by Congress of absolute plenary power over indigenous nations and what is left of their territorial base; moreover, the courts have implemented those provisions in a consistent way, with the ultimate purpose of reaffirming the federal supremacy over indigenous rights.

81. The situation in Canada is different from the American one in the sense that certain rights pertaining to indigenous peoples are enshrined in the Constitution Act, 1982, which recognizes and affirms existing aboriginal and treaty rights (sect. 35).

82. Present-day federal Indian legislation in Canada is based on a number of laws passed since the mid-nineteenth century, including the 1850 Lands Act and the 1857 and 1859 Civilization and Enfranchisement Acts. It proceeds from the legislative authority assumed over "Indians and lands reserved for Indians" by the newly constituted federal Government. It is not clear from the official materials how exactly this legislative authority was accorded the new

Government at the time of Confederation in 1867. The British North America Act or Constitution Act, 1867 simply gave Parliament, in section 91 (24), jurisdiction over Indians and land reserved for Indians.

83. At the time of confederation, it was assumed that the main challenge of Indian policy consisted in smoothing the way for indigenous communities to adopt Western ways - that is, to assimilate them into mainstream society. This was supposed to be accomplished through "enfranchisement", that is, the giving-up of indigenous status. In the dominant view, this process required both assistance and protection. It nevertheless took a century for indigenous people in Canada to obtain basic civil rights.

84. The principles of assistance and protection were incorporated into the Canadian Indian Act adopted by Parliament in 1876, which consolidated pre-existing legislation in the provinces and territories, and defined the responsibilities of the federal Government which had been established by the British North America Act of 1867. The Indian Act was revised in 1951, although not in a substantial fashion. Controversial provisions such as the banning of potlatch ceremonies were dropped from the act.

85. It should be noted that Canada has pursued since 1973 a claims settlement policy dealing with either specific or comprehensive claims. The latter are also called "modern treaties". According to the Canadian Government, comprehensive land claims settlements are a modern-day extension - and a more complex one at that - of the historical treaties concluded by Great Britain and other colonial powers with Indian nations.

> "Comprehensive claims are based on claims to aboriginal title arising from traditional use and occupancy of land. Such claims arise in those parts of Canada ... where aboriginal title has not been previously dealt with by treaty or other means. They normally involve a group of Indian bands or aboriginal communities within a geographic area. Settlement agreements are comprehensive in scope, including such elements as land title; specified hunting, fishing and trapping rights; financial compensation; and other rights and benefits." 37/

86. Land claims agreements - whether already negotiated or in the process of being negotiated - concern areas in Canada not covered by historical treaties, e.g. the Yukon, Labrador, British Columbia and the Northwest Territories. Regarding the Tungavik Federation of Nunavut Comprehensive Claim, it is stated for instance:

> "Comprehensive claims agreements continue a process that has been evolving for more than two centuries. The claims process involves negotiating settlements between Government and aboriginal peoples in Canada. These settlements are meant to result in a clarification of the rights of natives and non-natives with respect to land and resources." 38/

87. The significance and mode of interpretation of comprehensive claims settlements are subject to controversy. The first "modern treaty" to be concluded in Canada was the James Bay and Northern Québec Agreement of 1975. It was followed by the Northeastern Québec Agreement of 1978. Both concern Cree and Inuit of northern Québec. In 1984, the Inuvialuit Final Agreement was signed with the Inuvialuit (Inuit of the Western Arctic, Northwest Territories). In the 1990s, comprehensive agreements were reached with the

Yukon Indians, the Déné and Métis of the Mackenzie Valley (Northwest Territories), and the Inuit of the Nunavut Settlement Area (central and eastern Arctic, NWT). At present, negotiations are under way in northern Labrador with the Inuit, as well as in British Columbia. In Québec, there are negotiations with the Attikamek and Montagnais Indians, as well as the Algonquin nation and the Abenaki. The Special Rapporteur also takes note of the so-called treaty process currently under way in British Columbia, and looks forward to analysing the Agreement-in-Principle signed by the Nisga'a Tribal Council, Canada and British Columbia in February 1996.

88. While the Special Rapporteur reserves his conclusions on the relationship between historical and so-called modern treaties for his final report, he feels moved to stress at this juncture the issue of implementation of agreements reached with indigenous peoples by the Canadian federal Government and provincial - or other - instances. Implementations of such arrangements seem to pose considerable problems.

89. Regarding, for example, the James Bay and Northern Québec Agreement, the Special Rapporteur notes that it has given rise to much litigation, with a number of basic issues remaining unresolved. Materials relating to legal action undertaken by the indigenous signatories were transmitted to the Special Rapporteur in the beginning of 1993. It would be very useful for the last stage of the present study to obtain an update on these actions, especially with regard to action brought by the Grand Council of the Crees (of Québec) through the Grand Chief Matthew Coon Come and other chiefs to stop the La Grande project (filed on 10 May 1989 in Montreal). Most of the litigation seems to raise the issue of a basic misunderstanding about the Agreement regarding the construction of further hydroelectric complexes.

90. According to the chief negotiator on the indigenous side at the time of signing:

> "We have had 15 years of constant struggle to try to force Québec and Canada to respect their commitments under the overall James Bay Agreement. If I had known in 1975 what I know now about the way solemn commitments become twisted and interpreted, I would have refused to sign the Agreement. I would have gone to the Supreme Court and we would have found other ways to block the project - in the courts and on the ground." 39/

91. It has been argued that for the Government of Québec, the main objective was to develop the territory despite indigenous claims, as provided for by the 1898 and 1912 Boundaries Extension Acts that obliged Québec to settle outstanding indigenous claims through negotiated agreements, extinguishment of native title, compensation and the creation of reserve lands. For the indigenous peoples concerned, an important goal was to ensure the survival of traditional subsistence activities and continuing indigenous control over the territory and its future destiny. 40/

92. When Québec Premier Bourassa announced in 1970 the first James Bay Project without having consulted the Cree and Inuit who had lived and subsisted for countless generations on the land threatened by hydroelectric development, the indigenous parties took the issue to court on the strength of the aforementioned Boundaries Extension Acts. On 15 November 1973, the Québec Supreme Court under Judge Albert Malouf granted an injunction to halt construction of the James Bay project. Shortly afterwards, this injunction

was overturned by the Québec Court of Appeal which argued that the privileges of 6,000 aboriginal people could not be weighed against the rights of 6 million Québécois. 41/

93. According to Rosing, the James Bay and Northern Québec Agreement "is clearly inspired by the way that Native claims had been settled in Alaska, and Alaska is likely to serve as a model for future Canadian settlements as well". 42/ Many decades after the signature of the last numbered treaty in the Mackenzie region, the James Bay Agreement established the principle of the extinction of aboriginal land rights as the sine qua non condition of negotiations for such "comprehensive land claims settlements":

> "In consideration of the rights and benefits herein set forth in favour of the James Bay Crees and the Inuit of Québec, the James Bay Crees and the Inuit of Québec hereby cede, release, surrender and convey all their Native claim, rights, titles and interests, whatever they may be, in and to land in the Territory and in Québec, and Québec and Canada accept such surrender." 43/

94. It has also been argued that the James Bay Agreement was not ratified by the majority of the indigenous people concerned; many of them did not participate in the ratification process organized in 1975-1976. The Special Rapporteur notes the existence of so-called dissident indigenous communities that refused to recognize the Agreement and contested the representativity of the indigenous negotiators, saying that negotiations were conducted through ad hoc aboriginal groups whose formation was encouraged by the Government.

95. A perverse effect of the Agreement seems to be the bureaucratic control it has allowed over the entire north of Québec via the creation of a very sophisticated administrative structure that impedes rapid and flexible decision-making, 44/ one of the effects of that bureaucratic control being the establishment of a mechanism of political and legal acculturation imposed on the indigenous parties. Moreover, the text of the James Bay and Northern Québec Agreement - as that of all other agreements reached subsequently - is "complex, long and difficult". 45/ Some chapters are no more than agreements-in-principle requiring further negotiation in the course of which the diverging views of the negotiating parties have emerged clearly. Since the first signing, various amendments have been added to the Agreement, allowing the corporate signatory (Hydro-Québec) to modify the project, especially its planned extensions.

96. Despite the scale of the projects, there appears to be no overall assessment of their environmental repercussions, not even of the James Bay project, and even less so of the projected follow-up megaconstructions. Some effects have been, or are being researched, in particular the high occurrence of mercury poisoning in the food chain, related to flooding vast tracts of land in a subarctic climate. 46/ According to Billy Diamond:

> "The rights we gained in the James Bay and Northern Quebec Agreement to continue our traditional way of life are an illusion because the environment in northwestern Québec is being destroyed." 47/

97. In the fall of 1994, during his visit to the areas covered by the James Bay and Northern Québec Agreement, the Special Rapporteur saw for

himself the deleterious effects of the change in the course of the rivers required by the hydroelectrical projects, on the environment in general and the traditional subsistence activities of the indigenous parties.

98. While the 1975 James Bay and Northern Québec Agreement seems to be at least partially implemented, another agreement of the same period has not been implemented at all. This is the so-called Northern Flood Agreement reached on 16 December 1977 between Canada, the Province of Manitoba and the Manitoba Hydro-Electric Board and the Northern Flood Committee Inc., (this Committee represents the bands of Nelson House, Norway House, Split Lake and York Factory). The Agreement was reneged by the federal Government, which offered to "buy out" its treaty obligations and to abrogate the treaty by agreement with its beneficiaries who have been forced by poverty into submission because of failure to implement the agreement. The Special Rapporteur was informed that the government parties have submitted a new text to the Northern Flood Committee - a text that has not been transmitted to him.

99. Comprehensive land claims settlements basically relate to lands and resources. However, despite the formulation of alternatives to complete extinguishment of indigenous rights and title in the 1980s, the principle of extinguishment still determines the fundamental rationale of comprehensive land claims settlements. In this connection, the Special Rapporteur took note of the recommendations formulated on this and related issues by the United Nations Expert Seminar on Practical Experience Regarding Indigenous Land Rights and Claims, held at Whitehorse (Yukon Territory) on 24-28 March 1996. 48/

100. Canada also addresses the issue of specific claims, which - according to the documentation submitted by the Government of Canada - are defined as follows:

> "Specific claims arise from the alleged nonfulfilment of Indian treaties or the administration of lands and other assets under the Indian Act or other formal agreements. Through the specific claims policy, the Government provides an administrative process to research these allegations and to negotiate the settlement of any specific claims where a breach in lawful obligation can be demonstrated." 49/

101. Both comprehensive and specific claims are administered by special branches of the Department of Indian Affairs and Northern Development. Thus the instance responsible for violations of historical treaties or indigenous rights is the selfsame instance deciding whether a claim can be received and in what manner it is to be dealt with.

102. Another recent policy applied by Canada relates to funding arrangements for indigenous communities or band councils. That constructive arrangements between indigenous peoples and the Canadian Government basically involve money is evidenced by the Alternative Funding Arrangements with Tribal Councils, as well as the Comprehensive Funding Arrangement with Bands or Tribal Councils. 50/

103. According to the official documentation, Alternative Funding Arrangements (AFA) are "a government response to initiatives and views put forward by Indian people across the country". They were developed in response to a call for immediate action to promote administrative or policy changes under existing legislation, as a follow-up on the Penner Report of the Special

Committee on Indian Self-Government (1983). The purpose of the AFA initiative as authorized in 1986 is to "transfer responsibility for the redesign of programmes and establishment of priorities by Indian councils, while at the same time making Indian leaders more accountable to their memberships for the management of resources and the development of their communities". It is viewed as a first step in a process leading to Indian self-government legislation. A variety of concrete arrangements exist, which the Special Rapporteur has not had time to analyse in detail.

104. Among the agreements transmitted to the Special Rapporteur for consideration in his Study, one finds the Northern Bachelor of Nursing Program Agreement (29 August 1990) between the Swampy Cree Tribal Council Inc. and the Government of Manitoba and the University of Manitoba; the Canada-Manitoba-Northern Indian Child Welfare Agreement (22 February 1983); the Beverly-Kaminuriak Barren Ground Caribou Management Agreement (3 June 1982) between the Government of Canada, the Government of Manitoba, the Government of Saskatchewan and the Commissioner of the Northwest Territories, which establishes a board of 13 members including indigenous people; the Health Services Program Contribution Agreement between Canada (Minister of National Health and Welfare) and the Labrador Inuit Health Commission; the Conservation Agreement between the Shubenacadie Micmac District Bands (Afton, Pictou Landing, Millbrook, Horton, Bear River) and the Province of Nova Scotia; and the Porcupine Caribou Management Agreement (26 October 1985) entered into by the Government of Canada, the Government of the Yukon, the Government of the Northwest Territory, the Council for Yukon Indians, the Inuvialuit Game Council, the Dene Nation and the Métis Association of the NWT, to provide for the international coordination of caribou herd management.

105. One must also take into account that there are other kinds of agreements, such as so-called trilateral agreements involving indigenous people living off-reserve (e.g. the Algonquins of Barrière Lake Trilateral Agreement of 1991).

106. With the acquisition of the territories of the Hudson's Bay Company in 1870 (comprising present-day Alberta, Saskatchewan and Manitoba, the Northwest and Yukon Territories and the northern parts of Quebec and Ontario), the policy of systematic extinguishment of indigenous title and "enfranchisement" was extended over the indigenous inhabitants of these areas. The dominant view holds that this was achieved through the conclusion of the so-called thirteen numbered treaties (1871-1923). It has come to the attention of the Special Rapporteur, both on the basis of submissions made by indigenous delegations and the results of scholarly research carried out in Canadian academic institutions, that this interpretation is not shared by the indigenous signatories of these treaties.

107. Furthermore, despite attempts made on the basis of the 1983 Report of the Special Committee on Indian Self-Government to entrench the inherent right of Indian peoples to self-government in the Constitution, indigenous rights in Canadian law still proceed essentially from a contingent rights rationale. Thus, while one might assume that lands over which an indigenous people has retained possession in the form of a reserve confirms prior ownership rather than establishing a title at the discretion of the Crown, the Indian Act defined a reserve as "a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of the Indians".

108. The first self-government legislation in Canada was the Cree-Naskapi (of Quebec) Act of 1984, which replaced the Indian Act for the bands affected by it except for determining, significantly, which beneficiaries are Indians within the meaning of the Indian Act.

109. The prevalence of the contingent rights approach - together with the principle of extinguishment - is well illustrated by the situation of the indigenous nations in British Columbia in terms of jurisprudence: Calder v. Attorney-General of British Colombia (1973) R.C.S. 313 (C.S.C.), Delgamuukw et al. v. R..

110. Another relevant illustration of this approach is the treaty process currently under way in British Columbia, which is well illustrated by the Agreement-in-Principle reached on 15 February 1996 among the Nisga'a Tribal Council, the Government of Canada and the Province of British Columbia. As far as the treaty process is concerned, the Special Rapporteur is at present studying it more closely on the basis of various materials transmitted to him by all parties concerned - including those indigenous communities that have expressed their unwillingness to participate in the process because of the prevalence of the extinguishment rationale. What is at stake in these negotiations, the direction they may take and the balance of power they are likely to be ruled by is indicated by the fact that the Canadian Government, at one point, promised the aboriginal nations Can$ 22 million to cover their legal fees.

111. Similarly, the negotiation of a comprehensive land claims settlement with the Déné of the Northwest Territories could not be undertaken comprehensively. While agreements were reached with the Sahtu Déné and the Gwich'in Déné respectively, other Déné communities have to date not agreed with the agreement tabled by the government parties. The same observation applies to negotiations currently in process in the Province of Quebec, notably with the Attikamekw. On the other hand, the issue of the treaties involving the Mohawks of the Iroquois Confederacy still awaits further consideration by the government authorities. It is generally assumed, however, that indigenous title to the area in which the Mohawks now find themselves, that is, southern Quebec, was extinguished long ago by virtue of State succession (via France and the United Kingdom) and is no further object for negotiation or reconsideration. This view is not shared by the indigenous treaty party. This party feels bound by the Two Row Wampum that establishes the principle of peaceful coexistence without mutual interference, and the treaties concluded subsequently on the strength of the same principle.

112. In addition, one should bear in mind that there are fundamental differences of perception regarding the treaty process, treaty rights and the history and purposes of treaty-making between the indigenous signatories and the dominant government instances. The Task Force to Review Comprehensive Claims Policy stated this clearly:

> "The federal Government has consistently approached agreements with aboriginal groups, whether they were treaties or modern land claims agreements, with the objective of finality. It has aimed to secure clear title to the land for development and to guarantee that no future claim based upon aboriginal title could be made upon the land. Although the Government has expected that aboriginal peoples eventually would be

> absorbed into the dominant society, it also has felt obligated to protect them from the negative consequences of rapid social and cultural change until they have been assimilated. Usually, aboriginal peoples have approached the agreements as vehicles for the recognition of their unique historical position as the original inhabitants of Canada and for the provision of guarantees for their continued social and cultural distinctiveness in the future. Given the different expectations of the signatories, it is not surprising that the terms of the agreements have been the subject of continuing debate. 51/

113. This basic divergence of opinion is evident not only in the legislation but also in the jurisprudence. The Canadian Supreme Court ruling in Sparrow (1 R.C.S. 1075 (C.S.C.)) rendered in 1990 addressed for the first time the scope and content of section 35 (1) of the Constitution Act, 1982, which recognizes and affirms existing aboriginal and treaty rights. In their analysis of this ruling, Asch and Macklem arrived at the following conclusion:

> "Whatever its ultimate configuration, a new constitutional order must address First Nations' claims of an aboriginal right to sovereignty and self-government. In this essay, we have attempted to articulate the basic elements of two competing theories of aboriginal right. The first, a contingent rights approach, which requires State action for the existence of aboriginal rights, dominated early judicial pronouncements on the nature of aboriginal rights. The second, an inherent rights approach, which views aboriginal rights as inherent in the nature of aboriginality, came to be embraced by the judiciary in cases addressing the nature of aboriginal legal interests prior to the passage of the Constitution Act, 1982. In R. v. Sparrow, and despite other laudable aspects of the judgement, the Court addressed the meaning of 35 (1) of the Constitution Act, 1982 and ultimately betrayed a reliance upon a contingent theory of aboriginal right. As a result, the Court severely curtailed the possibility that s. 35 (1) includes an aboriginal right to sovereignty and rendered fragile s. 35 (1)'s embrace of a constitutional right to self-government." 52/

114. There is no possibility for the Special Rapporteur to deal in the present third progress report with the innumerable complaints advanced by indigenous peoples in Canada, both in Canadian forums and in the Working Group on Indigenous Populations and other United Nations bodies, on the lack of fulfilment by the federal Government of Canada of the obligations which, in their view, the latter has undertaken in the so-called historical treaties, including the numbered treaties. In this connection, the recent federal policy of treaty land entitlement shall also be reviewed.

115. Nor is the Special Rapporteur in a position at present to have all the inferences relating to the precarious situation in which non-treaty peoples (inter alia the Lubicon Cree and the Gitksan) find themselves. The advantages that new formal juridical relationships will have will be analysed by the Special Rapporteur in his final report.

III. CENTRAL AMERICA

SPANISH COLONIALISM (VARIANT I)

116. Regarding Central America, the Special Rapporteur has chosen two different kinds of situations: (a) the first related to the treaty relationship between the Miskito Indians and the British in present-day Nicaragua; (b) the second referring to Kuna Yala, that is, an autonomous territory of the Kuna in Panama.

Nicaragua

117. The territory corresponding to present-day Nicaragua was subjected to two types of colonial influence, British on the Atlantic coast and Spanish on the Pacific coast. Spanish colonization was based on forced assimilation and resulted in the annihilation of the pre-Columbian structures through violence and enslavement. Conversely, the British applied their usual colonial policy of indirect rule, fostering alliances with certain indigenous peoples.

118. The first English arrivals on Nicaragua's Atlantic coast came about through the activities of the Providence Island Company, which was established in 1630 to promote English trade in the Caribbean. Trade posts were built and relations between the traders and the indigenous people evolved more or less along the profitable lines established previously by English pirates. Great Britain placed a geopolitic rather than an economic interest on what was to become the Misquitia and sought to assert her influence by forming alliances and promoting trade with the local population, or rather with specific, well-chosen groups among whom the Miskito played a prominent role. Through their alliance with the British, the Miskito were put in a position of strength that allowed them eventually to dominate the entire Atlantic coast region. 53/

119. A distinctive feature of the Misquitia was the establishment of a monarchy. The historical interpretation of this institution has varied. Most probably, the Miskito used the figure of the king in a symbolic fashion, as a representative figure whose role was limited to maintaining good relations with the British settlers and, subsequently, the British colonial authorities. 54/ The representativity and legitimacy of this monarchy was recognized for instance by the convention on military cooperation signed by the British in June 1720 at St. Jago de la Vega (Jamaica) with "His Majesty Jeremy, King of the Mosquito Indians". Similarly, the Spanish treated with the monarchy, for instance in the field of trade relations.

120. Resistance against Spanish domination led to the independence of Central America (1821) and the constitution of a federal republic in 1824. This federation disintegrated in 1838 into several republics corresponding approximately to the former provinces of the colonial empire. British influence on the Atlantic coast dates back to the early 1600s and came to an end in 1894 when the region in question was incorporated unilaterally into the Nicaraguan State. Until that time, and even beyond, both regions lived separately.

121. Nicaragua gained independence in 1838. In 1838, the Misquitia became a protectorate of Great Britain. In this context, the role of the Miskito monarchy started to decline. In the course of hostilities between Nicaragua and Great Britain, the Treaty of Managua was concluded (1860). In this

treaty, which affects the Miskito as a third party, Great Britain recognized Nicaragua's sovereignty over all of the lands of the Miskito Indians without indigenous consent. By the same token, the Miskito monarchy was abolished and a sort of Miskito reserve was established (1860-1894).

122. In exchange for the recognition of her sovereignty, Nicaragua agreed to accord the Indians far-reaching autonomy, but did not live up to her promises. When Great Britain complained about violations of the Treaty of Managua, the conflict was transmitted to the Austrian Emperor Franz Josef for arbitration (1879). The decision rendered on 2 July 1881 clearly favoured the British position and Indian autonomy, by ruling that relations governed by international law had existed between Great Britain and the Miskito Indians.

123. Evidence having a bearing on the British Protectorate and the reserve era until incorporation of the Miskitia into the Nicaraguan State still warrants further analysis, especially with regard to the 1860 Treaty of Managua.

124. It should be noted, however, that until the 1950s, the de facto autonomy of the Atlantic coast was never explicitly challenged by the Nicaraguan State: no integration of its inhabitants into the national society was promoted, the indigenous peoples thus living in actual independence, which incorporation into Nicaragua had abolished de jure at the end of the nineteenth century.

125. In April 1996, the Special Rapporteur received from Augusto Willemsen Diaz, a well-known scholar on indigenous issues in Latin America, a substantial amount of materials documenting a series of steps in the process of domestication of the relations between the indigenous peoples of the Atlantic coast of Nicaragua and the post-independence Nicaraguan State. There has been no time, obviously, to carry out in-depth research on this. None the less, all the material received will be reviewed for the purpose of the conclusions and recommendations of the final report.

Panama

126. Some indigenous communities in Panama enjoy a degree of autonomy and have succeeded in gaining recognition of their land rights through national legislation, which otherwise ratified that these lands lie within the territorial jurisdiction of the Panamanian State. Most prominent among these indigenous communities are the Kuna of the Comarca of San Blas (or Kuna Yala), which encompasses some 40 islands scattered along the Caribbean coast, as well as a portion of the mainland. It must be noted, however, that the Comarca of San Blas does not encompass the totality of Kuna communities.

127. Panamanian law distinguishes between reserves and comarcas. A reserve is a system of collective and inalienable land tenure. A comarca is a system in which the collective land tenure is maintained, but also supplemented by a special administrative status, ideally smoothing the way towards the establishment of a distinct legal-political and administrative entity, which would find its place in the existing State structure.

128. The Kuna came into contact with Europeans at the beginning of the sixteenth century when the region corresponding to present-day Panama - especially around the Gulf of Darién - acquired strategic importance in the trade with Spain. From 1544 until independence from Spain in 1821, the central American States were part of the General Captaincy of Guatemala which depended directly on Madrid.

129. The centre of the Kuna territory lies in present-day Colombia, where one still finds Kuna villages. Kuna presence in the San Blas region is said to date back to the mid-nineteenth century. In the 1700s, the Kuna made alliances with Caribbean freebooters, especially in Jamaica. Between 1775 and 1789, together with the Jamaicans, the Kuna rose against the colonizer; they also attacked the mines exploited by Spain on the Gulf of Darién.

130. With the independence of Panama in 1821 and the constitution of the Central American Federation in 1824, the Kuna endeavoured to gain recognition of their sovereignty. Legislation passed in 1871 established the Comarca Tule Nega (the root Tule- refers to the Kuna individual), which spanned the present-day Panamanian-Colombian border. This area was governed by a commissary appointed by the State executive. His main task was to protect the Kuna against outside aggression.

131. It is generally held that, until the separation of Panama and Colombia in 1903, the Kuna were virtually independent, since they had not come under the control of the nation-State and were able to conduct their own foreign trade, especially with the British. 55/ The independence of Panama from Colombia was made possible by the construction of the Panama Canal, which was built with United States support. Concerned with building a national - Panamanian - identity, the State promoted the Spanish heritage and language, and adopted policies of assimilation and integration of the countries' indigenous peoples. Among the measures adopted to this end from the early twentieth century on, one finds efforts to police trade in San Blas, to encourage missionary intervention (especially Jesuit), to enact laws to "civilize the Indians" by leasing out indigenous land to non-indigenous settlers, by forcing the Kuna to adopt sedentarized cultivation, and by intervening actively in Kuna culture through the churches and the national education system.

132. Between 1915 and 1925, the Comarca Tule Nega was gradually dismantled by the establishment of an administrative district (circunscripción) called San Blas, by banning the Kuna from engaging in foreign trade, and by leasing out land without seeking the consent of the Kuna, for example, to the mining company Vaccaro Brothers to exploit manganese and to the United Fruit Company to establish banana plantations.

133. The Kuna view the Revolución Dule as a crucial step in their struggle for autonomy and cultural identity. The principal result of the revolution was that the State of Panama abandoned its policy of forced assimilation.

134. In 1930, a large number of Kuna communities sent a joint petition to the Government, which called for individual voting rights and collective rights for the inhabitants of the district of San Blas. On 12 December 1930, Law No. 59 was enacted; it established a Kuna reserve that was replaced subsequently by a comarca (Law No. 2, of 16 September 1939). On that basis, Law No. 16 (19 February 1953), which is still in force, organized the Comarca of San Blas (Kuna Yala).

135. At present, Kuna everyday life evolves in two worlds, one governed by traditional Kuna institutions, the other embodied by State-provided services and mainstream society. Kuna traditional institutions are based on the community and can be found in each village where the political life centres around the assembly hall in which the village leaders (saila) gather daily to perform ritual songs and discuss village business. Their sessions are public,

and each villager can voice an opinion. The saila are mostly elders endowed with specific ritual knowledge. They are accompanied by argarganas whose task is to translate into common language, for the general public, the traditional songs performed in ritual language. Apart from its ritual functions, the Kuna local congress tackles a variety of economic and administrative tasks and also renders justice. Decisions are made on the basis of consensus. There are also urban chapters of such congresses which group those Kuna who work or study in the city, while allowing them to maintain close ties with their native villages. Other Kuna institutions include traditional healers, and specialists of traditional subsistence activities, in particular horticulture.

136. Kuna local communities congregate in two central institutions. The General Congress of Kuna Culture groups the spiritual leaders of the communities; its main objective is to preserve and transmit the cultural and historical heritage of the Kuna. The Kuna General Congress is the central governing instance, presided by three grand chiefs from different regions of Kuna Yala. The Congress convenes several times a year and is made up of representatives of each community. It reaches most of its decisions by consensus and has competence in economic, political, administrative and judicial matters.

137. On the Panamanian side, the Kuna receives government services. They also deal with a direct representative of the executive, namely the intendant who, by law, has the power to approve or veto decisions taken by the Kuna General Congress. Furthermore, the Kuna elect three representatives to Parliament.

138. Kuna autonomy evolves within a complex institutional structure whose components may be in conflict depending on circumstance. While the Kuna General Congress represents Kuna traditional government and governs much of everyday life, a number of institutions representing mainstream Panamanian society are also present in the villages, especially through services provided by the State. The legal instruments governing this institutional set-up are: the national Constitution, Law No. 16 (1953) and the Carta Orgánica de los Indios de San Blas.

139. The Panamanian Constitution dates from 1972 and was revised in 1978, 1983 and 1991. It does not recognize any special rights to the country's indigenous communities, with one exception, namely article 116 referring to communal land tenure. This article guarantees to indigenous communities the necessary lands to achieve their economic and social welfare under collective property.

140. Law No. 16, enacted on 19 February 1953, entrenches a regime of autonomy for the Kuna of the Comarca de San Blas (Kuna Yala) and defines the extension of the Comarca. Furthermore, it establishes that the supreme authority within its borders is held by an intendant representing the State executive (art. 3), whose role is to enforce the law, supervise the Comarca's administration and registers, promote economic activities and the territory's development, and so forth. Regarding Kuna autonomy, the crucial provisions are contained in articles 11 (which provides for a form of political organization based on traditional Kuna chiefdom), 12 and 13 (which recognize Kuna jurisdiction and political institutions) and 21 (which allows the Kuna General Congress to approve, or disapprove, of individual or corporate development projects on Kuna land).

141. At present, the Kuna General Congress is seeking a revision of Law No. 16, which is mainly geared towards better recognition of Kuna political autonomy in relation to the Constitution of Panama, by establishing indigenous comarcas and State provinces on an equal footing.

142. The Carta Orgánica de los Indios de San Blas is viewed as the Kuna Constitution. It defines notably the powers and attributions of the traditional indigenous institutions, namely, the Kuna General Congress, local congresses, chiefs and grand chiefs. It also contains a section on Kuna traditions and one on the family.

143. Although Kuna autonomy has to function in relation to State institutions, it has the advantage of providing for the recognition of Kuna traditional institutions and of allowing the Kuna a measure of control over development projects in the autonomous territory, including exploitation of subsurface resources. 56/

144. But the State of Panama has not abandoned its initial goal of integrating and assimilating the indigenous peoples in general and the Kuna in particular. Furthermore, Kuna autonomy is granted through State legislation, while the State disposes of an array of legal means to ignore the opinions of the Kuna General Congress. Consequently, one can argue that the autonomous regime enjoyed by the Kuna at present and the limitations thereto are a good illustration of what is at stake in the ongoing debates on autonomy or self-government as opposed to indigenous self-determination.

IV. THE SOUTHERN CONE

SPANISH COLONIALISM (VARIANT II)

145. The indigenous people retained for study in Part IV are the Mapuche, now under both Chilean and Argentinian jurisdiction. One could also have chosen the indigenous peoples of the Gran Chaco (northern Argentina) such as the Toba and the Mocoví, since these are parties to a number of compacts concluded either with the colonial authorities or the Argentine State. The Special Rapporteur received copies of these compacts via the Asociación Indígena de la República Argentina (AIRA).

146. The State of Argentina made treaties with indigenous peoples in the context of the so-called conquista del desierto in the late 1800s, which initiated colonization proper after two crucial military expeditions: the Uriburu expedition of 1870 and the Victoria expedition of 1884. For example, the Spanish governor of Tucumán, Don Géronimo Matorras, made a treaty with the Toba and Mocoví in 1774, which recognized indigenous territories in the Chaco, banned slavery and other forms of bondage (including the encomienda) and provided for religious instruction and Spanish language teaching, as well as for facilitating the Indians' conversion to sedentary farming; the treaty also provided for assistance - notably horses - against the Abipone the indigenous signatories were at war with. In exchange for these benefits, the Indians submitted themselves to the Spanish Crown. The treaty also provided for "protectores de indios" to represent them in court. If the signatories proved their fidelity to the King, they received weapons to defend themselves against their enemies. More recently, in 1825 and 1864, the State of Argentina represented by the governor of the Province of Corrientes, Ferré, entered into two treaties reconfirming the territorial rights of the Mocoví and Toba.

147. Following the conquista del desierto and atrocities against the Toba people, the National Executive enacted a decree on 19 February 1924 which established a reserve of 100,000 hectares. This decree was not implemented; rather, provincial law No. 2.913 (art. 7) reduced the surface of this reserve by half and article 18 of the same law stipulated the public sale of indigenous land. 57/

148. The region also offers an example of a treaty affecting indigenous peoples as third parties, namely the Tratado de Permuta of 1750 between Spain and Portugal, which provided for the exchange of the seven most easterly Paraná missions (with some 30,000 inhabitants) for the town of Colonia do Sacramento. Jesuit missions had played an important role in the Argentine interior in the late seventeenth and early eighteenth century. This applies in particular also to the two dozen missions of the Upper Paraná, including about 50,000 Guaraní, Mocoví and other Indians. The Treaty of Permutation provoked a Jesuit revolt (but was declared null and void in 1759 after Charles III came to the throne in Spain). 58/

149. A large number of agreements made with the Mapuche (Renqueles or Ranqueles in the Argentinian context) have been brought to the attention of the Special Rapporteur. When Buenos Aires was made the viceregal seat in 1776, attempts began to fortify the border. In 1770, Governor Bucarelli had signed a peace treaty with Mapuche chiefs in order to obtain their recognition of the forts which had been built since 1776 in view of establishing a permanent boundary. In 1781, during the reign of the viceroy Vértiz and following military defeat of the Pehuenche of the Andes, a peace treaty was made, which guaranteed the signatories mutual recognition of their respective territories. Nevertheless, this treaty was quickly followed by renewed "punitive" expeditions against the Indians. In 1782, Vértiz signed another peace treaty with the Pehuenche.

150. Until 1828, the Argentine army conquered large tracts of land in the eastern pampa that were well suited to raising cattle; wealthy landlords supported these ventures and eventually took advantage of them through the foundation of haciendas. A number of forts were established (Independencia, Bahía Blanca, 25 de Mayo, Junín) to secure occupation. This push was accompanied by several attempts to conclude agreements with the Indians of the pampa, bringing them either to cede land or to accept formally forced territorial acquisitions by whites.

151. In 1833, Juan Manuel Rosas undertook a large-scale military expedition against the Indians inhabiting the pampa and northern Patagonia. The Mapuche suffered a number of defeats and the colonizers achieved complete victory. Nevertheless, the most fertile areas of the pampa west of Buenos Aires was conquered by the army. Rosas opted for keeping the Indians in check through regular provisions of cattle and merchandise.

152. Regarding the Mapuche, they waged a long war of resistance, especially in present-day Chile, against the Spanish invaders and territorial successors, the Government of Chile, the so-called Guerra de Arauco. The Mapuche succeeded in maintaining their political independence and territorial sovereignty for over three centuries after contact with Europeans, starting with the defeat of the Spanish army in the so-called Desastre de Curalabá (1598).

153. In the context of the Guerra de Arauco, parlamentos or peace conferences leading to oral or written agreements between the colonial authorities and the Mapuche played a crucial role. After Curalabá and the destruction of colonial establishments in Mapuche territory, Spain started to pursue a peace policy. The most important peace talks of the seventeenth century - which Frias Valenzuela has described as el siglo de los parlamentos 59/ - were the Paces de Quilín of 1641, which established the Bío-Bío as the border between the Spanish colony and the Mapuche territory. This agreement served as a model for all subsequent agreements reached during the colonial era (the last of which was concluded at Negrete in 1803).

154. A number of agreements reached during parlamentos recognized Mapuche sovereignty and independence in the area extending south between the Bío-Bío and the Toltén rivers (however, by the same token the Mapuche lost an important section of their traditional territory lying north of the Bío-Bío). Moreover, both parties to the compacts agreed to the establishment of missions and trade relations. According to Bengoa, the independent Mapuche territory did not belong to the General Captaincy of Chile but rather had direct relations, as an independent nation, with the colony. 60/

155. Peace talks also took place all through the eighteenth century, many of these convened by the Governor of Chile and highly ritualized. 61/ The Parlamento de Negrete of 1726 is considered as the prototype of Mapuche peace agreements. Its provisions included: recognition of the King of Spain, acceptance of the construction of Spanish forts along the southern shore of the Bío-Bío, receiving missionary instruction and accepting baptism, the maintenance of indigenous criminal jurisdiction and the banning of Spanish private ventures within the independent territory. 62/

156. On the other hand, parlamentos were also used as tools of colonization, as in the case of the so-called Parlamento de las Canoas convened in 1793 by Ambrosio O'Higgins (then Governor of Chile) with the Huilliche after the latter had risen against the colony in 1792 but were defeated. By this agreement, the Huilliche ceded important portions of their territory to the Spanish Crown and agreed to the establishment of missions.

157. During the liberation wars in Chile, the Mapuche became involved, willy-nilly, in the notorious guerra a muerte (1819-1822) and subsequently in the Chilean civil war of 1851. 63/ In this back-and-forth, their bargaining position was not always strong.

158. Independent Chile inherited the Araucanian problem, since the Mapuche territory enjoyed a special status on the basis of the parlamentos entered into with Spanish colonial authorities until 1803, when the parlamento of Negrete recognized once again the Bío-Bío river as the border with the Mapuche. 64/ But it took Chile 70 years to occupy and subjugate Araucania.

159. With the promotion of European settlement in the mid-nineteenth century, the agricultural frontier crossed the Bío-Bío and extended to the Malleco river, forcing large numbers of Mapuche families off their land. During the so-called pacification of Araucania (1866-1885), legislation was enacted to incorporate the Mapuche territory into the Chilean State.

160. In 1852, the province of Arauco was created as the Chilean outpost in the territory situated immediately south of the Bío-Bío river, the traditional border with the Mapuche, and inhabited at that time by a small number of

Chilean farmers and military personnel. By the same token, the Chilean State assumed unilaterally jurisdiction over the new province and set out to "protect" and "civilize" its indigenous inhabitants.

161. In 1866, a law providing for the incorporation of Mapuche lands into the public domain was enacted. By the end of the nineteenth century, 9 million hectares had either been distributed in lots of 40 hectares to demobilized military personnel or allotted in lots of 500 hectares to settlers who were entrusted with the task of "protecting and civilizing" the indigenous communities established on their land, which meant, in particular, forcing the Indians to become sedentarized.

162. In 1885, the Mapuche were defeated and their territory occupied by the Chilean army, which had come home victorious from the Guerra del Pacífico with the Bolivian-Peruvian Confederation. Once military victory had been achieved, the Chilean State set out to dismember systematically Mapuche land holdings. The main role in this process was played by the Comisíon Radicadora de Indígenas created in 1883, which made a census of the Mapuche families and surveyed their agricultural and grazing lands to decide on how much land to allot a given family. Generally, less land than what extended families occupied was allocated, for only land permanently cultivated was taken into account. These became reducciones, for which each family received a title (título de merced).

163. Although these titles allowed the Mapuche to own their land communally, they actually contributed to dissolving Mapuche land holdings. For instance, one third of the Mapuche were not settled anywhere. This is notably the case of the Huilliche - or southern Mapuche established in the provinces of Osorno and Llanquihue - who hold their traditional lands illegally according to Chilean law. All in all, only 77,752 land titles were attributed during the period the Commission functioned (1883-1920). Furthermore, many Mapuche resented being settled on small reservations after having occupied traditionally a vast territory; the reservations cover little more than 6 per cent of both provinces (Arauca and Osorno) and are often situated on land of inferior quality for cultivation. Finally, people were arbitrarily grouped together under títulos de merced; often they came from different families and did not recognize the same chief.

164. The implementation of the settlement policy was much influenced by the North American experience. Cornelio Saavedra, the main military authority in Araucania, had succeeded in imposing the idea that in order to appropriate the lands of the Mapuche, several related measures had to be taken, namely, pacification of the territory by the army, railway construction to facilitate communication and transport, assumption of State monopoly regarding the acquisition and sale of land, and European immigration. 65/ Thus the State declared itself sole owner of the land, while the Mapuche were denied all title, or rather had to acquire title from the State, as required by the law of 1866.

165. Starting in 1927, various laws were enacted with a view to fragmenting the Mapuche land holdings. These were subsequently incorporated into Decreto Supremo 4.111 (1931), which remained in effect until 1971 and resulted in the division of 832 communities for privatization. Its purpose was to allot fertile land to individuals determined to farm it, many of whom were not indigenous.

166. Ley 17.729 of 26 September 1972, promulgated under the Government of Unidad Popular with the input of Mapuche regional associations, attempted to stop this process of territorial fragmentation. It also provided for the recuperation of land lost or usurped and established the Institute for Indigenous Development. But it was assimilation legislation meant to promote the Indians' integration into the national community. These provisions were never properly implemented and were made null and void through legislation passed under the military dictatorship.

167. Recently, Chile adopted special legislation regarding the country's indigenous peoples (Ley indígena, 1993) whose relevance in connection with the issue of treaties, agreements and other constructive arrangements, as well as that of non-treaty peoples in present-day Chile, has just started to be assessed by the Special Rapporteur.

168. It is worth stressing in this connection that the question of domestication in the Chilean context has to date not been addressed in the literature consulted, although there are clear indications that some legislation passed in the second half of the nineteenth century had the effect of domesticating relations with the Mapuche - at least those of the territory situated south of the Bío-Bío river. This applies for example to the 1866 law providing for the incorporation of the territory south of the Bío-Bío in the public domain, as well as the various laws aimed at breaking up Mapuche land holdings (títulos de merced) and finally to the active promotion of European colonization carried out in violation of the agreements reached with the Mapuche - at least those regarding the territory south of the Bío-Bío.

169. In recent years, Mapuche organizations have taken considerable interest in the treaty issue. In particular, the Consejo de Todas Las Tierras (Aukiñ Wallmapu Ngulam) adopted a resolution during the fourth session of the Mapuche Tribunal held at Temuco/Chile from 28 to 30 March 1994, which recalls the historical significance of the agreements entered into by their forebears with the Spanish Crown and confirms the binding character of these agreements.

170. Since the very beginning of his mandate, the Special Rapporteur has received documentation, first from indigenous groups in Argentina (1988) and subsequently from Mapuche in Chile (1991). He appreciates the research work already carried out by the organizations involved, especially that of the Asociación Indígena de la República Argentina and the Consejo de Todas Las Tierras based in Chile, which will be extremely helpful to him when formulating his final conclusions, proposals and recommendations.

V. NORTHERN EUROPE: THE LIMITATIONS OF A "CONSTRUCTIVE ARRANGEMENT"

171. Until quite recently, Greenland, more than 50 times the size of Denmark, was politically administered as an integral part of the smaller country. It has a population of some 55,000, the majority of whom are Inuit (approximately 85 per cent), compared to some 5 million inhabitants in metropolitan Denmark.

172. "Since the voyage of the Danish missionary Hans Egede to Greenland in 1721, Greenland has been considered a Danish colony." 66/ In 1979, and according to the Chairman of the Commission on Home Rule for Greenland, things were as clear-cut as that. But, what took place in fact was a gradual expansion of Danish influence, which in the end covered the entire territory of Greenland.

173. The Norse presence dates back to the last quarter of the tenth century when Icelandic and Norwegian seafarers arrived on the south-west and west coasts. Their settlements came under the King of Norway in 1261. However, this early population perished before 1500. Scholars such as Gudmunder Alfredsson attribute this disappearance to a variety of factors, including armed conflicts with the Inuit and possibly the lack of communication and transport from Europe.

174. Although the Norse settlements were no more, Greenland remained, at least on paper, a Norwegian colony until 1814. That year Sweden and Norway ceded the Atlantic possessions of the latter to Denmark in the Treaty of Kiel.

175. Greenland was recolonized in the first half of the eighteenth century by Norwegian and Danish missionaries and merchants. It was the first time that the Greenlandic Inuit came under foreign domination. The rule continued, first in the form of royal instructions and, later, by legislation originating in Copenhagen which Alfredsson maintains, "were written and enacted by Danes, fraught with paternalistic attitudes, and certainly good for the maintaining and securing of continued Danish sovereignty over the island." 67/

176. As in many of the other regions discussed in this and previous reports, commerce was the motivating factor in going into and seeking domination over the territory in question. In 1721, Egede formed a "Greenland Company" and set off for that island, the largest in the world. A new colony was established on its west coast.

177. In 1723, the Greenland Company was granted a royal concession placing "the whole country of Greenland" at its disposal for a period of 25 years. Until 1774, the conduct of Greenland affairs was regulated through several concessions granted to different entities, which were all backed by royal ordinances protecting the respective trade monopolies. In 1774, the Danish authorities themselves established a trade monopoly with regard to Greenland, followed in 1781, by regulations dividing "the country" into a northern and a southern district, governed by "inspectors" who were not only entrusted with the supervision over the trade monopoly, but were also given powers of general administration.

178. After the Treaty of Kiel, the Danes maintained the trade monopoly over Greenland and granted concessions for the colonization of its east coast. However, it was not until 1894 that the first colony was established there. Up to 1921 more and more colonies were established on Greenland, accompanied by administrative decrees and ordinances, thus increasing the level of Danish authority over the island.

179. During and immediately after the First World War, the Danes sought recognition of their sovereignty over Greenland. An example of such "recognition" can be found in the 1916 United States declaration on the cession of the Danish West Indies (today the United States Virgin Islands):

> "... the undersigned Secretary of State of the United States of America, duly authorized by his Government, has the honour to declare that the Government of the United States of America will not object to the Danish Government extending their political and economic interests to the whole of Greenland." 68/

180. France, Italy, the United Kingdom and Japan issued similar declarations in 1920, as did Sweden in 1921. The only country that refused to recognize Danish sovereignty over Greenland was Norway, which claimed to have certain economic interests on its east coast. Negotiations to resolve this dispute were fruitless. In the meantime, Danish authorities continued to make administrative regulations for Greenland, which met with "categorical reservations" from Norway.

181. In 1931, Danish sovereignty over Greenland was challenged by Norwegian decrees placing portions of eastern Greenland under Norwegian sovereignty, based on the assumption that they were terra nullius. The issue went to the Permanent Court of International Justice in 1933. In effect, the Court decision would confirm Danish sovereignty over the whole of Greenland on the basis of the intention and the will of Denmark to act as sovereign and the continuous manifestation of State activity. It has been argued that it could have well been possible for the Court to have ruled against the Danish claim of effective occupation, if that had been weighed against the claims of the native population, provided they had locus standi.

182. The Court, however, used the fact that Greenland was inhabited prior to colonization as an element in favour of Danish claims and, in passing, lightly assumed that early settlements perished because their "inhabitants were massacred by the aboriginal population". 69/ In no way does the Court refer to the indigenous inhabitants as relevant actors in this case, nor were their wishes taken into consideration.

183. After the Court's ruling, there was no further disagreement as to the status of Greenland and in 1946 Denmark listed the island as a non-self-governing Territory under Chapter XI of the Charter of the United Nations.

184. In the 1860s, the Danes - for the purpose of increasing productivity - introduced limited native participation on local administrative boards. That system was slowly widened to the current home rule. It was only in 1920 that the Greenlanders gained seats on a committee entrusted with the drafting of a bill concerning the island's administration. 70/ This practice has been retained since then, although the Greenlanders have consistently been disadvantaged members of such bodies up to and including the Home Rule Commission, which drafted legislation relating to the introduction of home rule.

185. The move from colonization to integration followed a shift in the administration of Greenland from Copenhagen to the establishment of local organs of government in the second half of the nineteenth century. It was only in January 1963, when the local Greenlandic governmental system was extended to include North and East Greenland, that the responsibilities of the Hunters' Council, under the Thule Act, were taken over by a municipal council and a local court (for more on the Thule Act, see paras. 198 and following, below).

186. In 1953 the Danish Constitution was revised. The Constitution was extended to Greenland, which thus became an integral part of the Danish Kingdom, with the same constitutional position as the other parts of the realm. In addition, Greenland obtained the right to send two representatives to the Parliament in Copenhagen.

187. This integration was approved by the General Assembly of the United Nations in resolution 849 (IX) of 22 November 1954 and Greenland was removed from the list of non-self-governing Territories. According to the same resolution, Greenlanders had exercised their right to self-determination, through integration with Denmark.

188. However, there are a number of arguments against this interpretation. First of all, the Greenlanders were not given much of a choice. The options were the status quo or integration. There was no mention of independence or of any other form of linkage.

189. Secondly, the Constitutional Commission that worked out the proposals for integration was composed of Danes only. It began work in the summer of 1952 and submitted its proposals in August of that year to the Greenlandic Provincial Council which swiftly approved them, in less than a month.

190. Thirdly, Greenland did not possess the type of local political institutions, such as those described in the Charter of the United Nations, that would have put Greenlanders in a better position to decide on their future, i.e. the Provincial Council was not a free political institution. Its composition and functions were regulated by Danish law. Its powers were mainly advisory and its chairman was the Danish Governor of Greenland. (Furthermore East and North Greenland had no delegates on the Provincial Council and their local councils, albeit representing a small part of the population, were not consulted on integration.)

191. Lastly, the population was not consulted. Contrary to the situation in Denmark, there was no referendum held in Greenland about the integration. Alfredsson writes of this situation:

> "Considering that the incorporation of Greenland was intended to end the colonial status, one notes with regret certain flaws in the implementation of said changes on the national level; flaws which had to do with the continued employment of colonial practices to end the colonial system itself." 71/

192. All this leads many to conclude that the process of integration does not amount to the exercise of the right to self-determination of the Greenlandic population. In fact, this is corroborated by the mere installation of home rule, which gives a form of autonomy to the population and on which a referendum was held that showed considerable support for this arrangement. If the population had been content with integration as a Danish province, they would not have approved home rule.

193. The discussions between Greenlandic and Danish politicians and officials in the Home Rule Commission which led to introduction of limited autonomy called home rule in 1979, can in no way be described as an exercise of the right of self-determination.

194. The results of integration reduced the available options to a choice between the status quo and home rule. The process was again dominated by the Danish authorities through the use of the Danish language, through their expertise, and through their majority in and chairmanship of the Home Rule Commission. The whip of financial control hung in the air, the Greenland economy being subsidized by Danish contributions.

195. The outcome, the Greenland Home Rule Act, was a rearrangement of administrative practices in Greenland through the delegation of certain powers from Copenhagen. It was done by two acts of the Danish Parliament, one before and one after the advisory referendum in Greenland. These acts can be changed or cancelled at any time, according to Danish constitutional law, even without consulting the Greenlanders, by another act of the same Parliament where the Greenlanders have two representatives out of a total of 179.

196. While dismissing some criticism of home rule, former Greenland Minister of Social Affairs Henriette Rasmussen does admit "there is no doubt that the uncritical transfer of Danish administrative and legislative tradition might not have been the best for the big, scarcely populated island that is Greenland". 72/ This transfer, she wrote, made it necessary, particularly in the administrative field, to import Danish academics as "experts". The result of bringing in Danish lawyers, economists, engineers, architects and construction workers who, "because of their familiarity with the European system, on the one hand, are really experts, but on the other are being located in a culture and a country that is totally strange to them ... can create some insecurity between the imported academic workforce and the Greenlandic local population and result in complaints that cannot be described as real conflicts since there also exists an interrelationship between the two groups, the imported workforce and the unemployed local population". Unemployment is high in urban areas and has a negative impact despite what Rasmussen describes as a "good social security system". She goes on to write that "some of the problems of poverty derive from the ban on aboriginal hunting products by other countries, especially the United States and the European Union". 73/

197. Rasmussen stresses that:

> "In recent years ('the adolescence of Home Rule') Greenlandic politicians in the Parliament and Government have raised slogans such as: 'self-management at the grass-roots, self-management for the towns' and 'greater respect for the Greenlandic language in political bodies as well as in administrative ones', that demonstrate that there are, or has been, problems related to implementation of Home Rule."

She makes a point in mentioning that a dispute emerged when home rule was introduced and the pro-independence Inuit Atagatigiit party (the human or Inuit brotherhood), which opposed home rule as a colonial carry-over, demanded full and collective ownership over the land and its resources. However, in a plebiscite, the majority voted to approve home rule with "property limited to the land and the resources and a legislative power that did not include the judicial system and foreign relations". 74/

198. The 1933 ruling of the Permanent Court (see paras. 181-183 above) casts rather an odd light upon the behaviour of Danish officials with respect to Cape York, in what is now called the Thule district where the United States Thule Air Base is located. There was no colonization of this land by the Danes, but rather a contractual transfer to the Danish State.

199. In 1910, Knud Rasmussen, a Danish explorer, founded, with the consent of the Inughuit (local Inuit tribe), a private trading station, Cape York. When, in 1925, the Danish Parliament requested Rasmussen to place the Cape York

district under Danish colonial authority, Rasmussen refused. From this it is clear that the Danish authorities did not regard themselves as having sovereignty over this area.

200. In 1927, Rasmussen and the Inughuit set up the Hunters' Council to settle relations and authority in the Cape York area. This Council adopted what is now known as the "Thule Act", which declares in its preamble that "all members of the Tribe constitute the society, and the society speaks through the Hunters' Council".

201. The "Thule Act" was ratified by Denmark on 8 September 1931. This meant that the Danes accepted the legislative power of the Hunters' Council.

202. On 4 May 1937 an agreement was concluded transferring the station to the Danish authorities. To interpret what this transfer represented, one should consider that what Rasmussen had acquired, namely a right to operate a trading station, was now transferred, by agreement, to the Danish authorities. In fact, the Danish Prime Minister stated in a note to the chairman of the Hunters' Council that "the takeover by the State of the trading station at Thule ... does not affect the present legal position of the district".

203. Thus what the State acquired was a limited set of rights to run a trading station, leaving all rights laid down in the Thule Act in the hands of the Inughuit.

204. From this it is clear that the Danish authorities did not consider the Cape York area to be terra nullius. Since all that was acquired was a limited set of rights to run a trading station, not sovereignty, all Danish actions overstepping the contents of this set of rights could be looked upon as an infringement of the Thule Act and the jurisdiction of the Inughuit.

205. In connection with this issue, the Greenlandic former minister of social affairs goes on to note how poorly the Home Rule Government fairs against large powers with conflicting interests.

> "The facts surrounding the Thule Air Base and the resettlement of the local population in Qaanaaq, and the fact that the United States Air Force has violated agreements and has used the base as a deposit for atomic bombs, resulting in an air accident with one of the planes loaded with atomic bombs in 1968, reveals the weakness of the Law of the Home Rule Government in relation to powers such as the United States, and even the weakness of the Danish State, which has now raised concerted protests in Greenland and Denmark." 75/

206. The explosion of that B-52 bomber contaminated the area with plutonium. It was 19 hours after the accident before the news reached Denmark. The United States had deliberately held back the information since it feared the political consequences, the reason being that nuclear weapons were banned from Danish territory, and consequently from Greenland, during peacetime. Public opinion in Greenland and in Denmark was calmed down with assurances that this was a unique instance. Nevertheless, nothing was done for the Danish and Greenlandic workers who had to clean the contaminated area without any special protection. Some parts of the four hydrogen bombs involved were never found. Over the years hunters have observed various malformations in the seals and radioactive contamination is feared.

207. In a report released on 29 June 1995, the Government of Denmark admitted publicly that it had had knowledge that the United States had atomic bombs in Greenland. From the beginning of the 1950s and until the fatal accident in 1969, the B-52 bombers had flown thousands of flights over Greenland while carrying atomic weapons. In addition, the United States had had an atomic arms deposit in the Thule base.

208. The report revealed that then-Prime Minister of Denmark, H.C. Hansen, in 1957, without the knowledge of the Government of Denmark, had given the United States a silent "OK" of its atomic policy in Greenland. The Government of Denmark affirms in the report that, because of the secret agreement, the United States had acted in good faith. Nevertheless, there are many indications that Denmark wanted to absolve the United States and blame everything on the former prime minister. What really happened in November 1957 was that the United States, in deep secret, questioned the Prime Minister and the Minister for Foreign Affairs as to whether the Government wanted to be informed if the United States, in fulfilment of the defence treaty for Greenland, was stationing atomic bombs on the island.

209. In addition to these obvious limitations, the Home Rule Authorities' powers are restricted both by Danish national legislation and international agreements entered into by Denmark. Since the Danish Constitution has full effect in Greenland, all constitutional rules must be abided by by the Home Rule Authorities. For example, the power to conduct foreign policy is a constitutional prerogative of the Government of Denmark, and obligations arising out of treaties and other international rules binding on the Kingdom are also binding on the Home Rule Authorities.

Notes

1/ Document E/CN.4/Sub.2/1995/27, paras. 130-331.

2/ Unbelievably enough, the idea of a community of "civilized nations" has shown remarkable capacity of legal survival. It re-emerged in 1945 in the wording of article 38 of the Statute of the International Court of Justice, which is an annex to the Charter of the United Nations.

3/ Quoted by Dieter Dörr "Die Wilden und das Völkerrecht", Verfassung und Recht in Übersee (Hamburg) 24 (1991), p. 379.

4/ Christian Wolff, Ius Gentium: methodo scientifica pertractatum (1764) (Oxford, Clarendon Press, 1934) (2 vols.).

5/ Clive Parry (comp.), The Consolidated Treaty Series (Dobbs Ferry, Oceana Publ., 1969-1986) (231 [treaties] plus 12 [index] volumes).

6/ Document E/CN.4/Sub.2/1995/27, paras. 176-237. Thus, it appeared that in New Zealand, statutory law giving effect to the provisions of the Treaty of Waitangi (1840) has played a crucial role in view of domestication.

7/ Sally Weaver, Making Canadian Indian Policy: The Hidden Agenda, 1968-1970 (Toronto, University Press, 1981).

8/ Alexis de Tocqueville, De la démocratie en Amérique (1835-1840) (Paris, UGE, 1963), p. 188. Any insufficiency to be detected in the above unofficial English version of the original French is the sole responsibility of the Special Rapporteur.

9/ Significantly, George S. Grossman stressed that "traditional Indian legal practices have received relatively little attention" in the literature on "Indian law"; see George S. Grossman, "Indians and the law", in New Directions in American Indian History (Colin G. Calloway Ed.) (Norman, University of Oklahoma Press, 1988, p. 119).

10/ The contents of this part of the present report drew heavily on Curtis G. Berkey, "United States-Indian relations", in Exiled in the Land of the Free (John Mohawk & Oren Lyons Eds.) (Santa Fe, Clear Light Publ., 1992), pp. 189-225.

11/ The Harvard Classics (vol. 43) (Charles W. Eliot Ed.), American Historical Documents 1000-1904 (New York, P.F. Collier & Sons, 1938), pp. 160, 162, 163.

12/ Quoted by Berkey, op. cit., p. 211.

13/ This provision was recalled in detail by Chief Justice John Marshall in his ruling in Worcester v. Georgia. He also reiterated the original understanding of the scope of federal powers for dealing with Indian nations under the Constitution: "all that is required for the regulation of our intercourse with the Indians, that is, the powers of war and peace, of making treaties and of regulating commerce". See Vine Deloria Jr, "The application of the US Constitution to American Indians," in Exiled in the Land of the Free, op. cit., p. 290.

14/ Berkey, op. cit., p. 204.

15/ M.B. Hooker, Legal Pluralism. An Introduction to Colonial and Neo-Colonial Law (Oxford, Clarendon Press, 1975), p. 313.

16/ Deloria, op. cit., pp. 290-291.

17/ Ibid., p. 296.

18/ Ibid., p. 297.

19/ Ibid., pp. 285-287. See also Robert Williams, "Documents of barbarism: the contemporary legacy of European racism and colonialism in the narrative traditions of federal Indian law", in Arizona Law Review 31 (2) (1989), pp. 237-278.

20/ See Walter Williams, "United States Indian policy and the debate over Philippine annexation: implications for the origin of American imperialism", in Journal of American History 66(4) (1980), pp. 810-838.

21/ The quotes from the Supreme Court cases were taken from the relevant source materials provided to the Special Rapporteur by the American Indian Law Alliance in New York.

22/ Keith Werhahn, "The sovereignty of Indian tribes: a reaffirmation and strengthening in the 1970s", in Notre Dame Lawyer 54 (1) (1978), pp. 8, 9.

23/ Deloria, op.cit., p. 288.

24/ Ibid., p. 289.

25/ Ward Churchill & Glenn Morris, "Key Indian laws and cases", in The State of Native America (A. Jaimes Ed.) (Boston, Southend Press, 1992), p. 19.

26/ See E.g. Milner Ball, "Constitution, Court, Indian Tribes", in 1987 American Bar Foundation Research Journal, pp. 1-140.

27/ Churchill & Morris, op. cit., p. 14.

28/ See E.g. Vine Deloria Jr & Cliffort Lytle, The Nations Within: The Past and Future of American Indian Sovereignty (New York, Pantheon, 1984).

29/ Deloria, op. cit, p. 289.

30/ Churchill & Morris, op. cit., p. 15.

31/ Document E/CN.4/Sub.2/1992/32, paras. 290-297.

32/ Renate Domnick, written communication. The Indian Claims Commission award was attributed in 1979 (not in 1974) for an amount of US$ 26 million. In the proceedings of the Claims Commission, the Treaty of Ruby Valley was generally ignored. There was no doubt among the Western Shoshone, however, that the Treaty was still in force. On this basis, Ms. Domnick thinks that the formulation "a reversal of policy had taken place on the indigenous side" is incorrect, since this was the interpretation of the Court of Claims when the Western Shoshone tried to intervene in opposition to their lawyers. She continues that, taking for granted that the Treaty was still in effect, the Western Shoshone believed that their case was about a reaffirmation of their Treaty rights, so that the people of the United States would be made aware of these and brought to respect them. In her opinion, they were misled by the attorneys who pretended arguing the Treaty, while in reality they pursued a strategy aimed at obtaining the claim money in order to receive the 10 per cent share they were entitled to under the Claims Act. Since the Western Shoshone had no direct access either to the ICC or to the files, they became aware belatedly of the manipulations by their attorneys; they subsequently attempted to counter the latters' strategy. Another important factor according to Ms. Domnick is that one group - the Temoak Band Council - had been singled out as sole plaintiff in a case that concerned the entire territory defined by the Treaty of Ruby Valley and thus the entire Western Shoshone nation. The "reversal of policy" was a result of having uncovered eventually the fraud committed by the attorneys, which led to unified action among the Shoshone to overcome the arbitrarily established "exclusive representation" by the Temoak.

33/ Churchill & Morris, op. cit, pp. 15-16.

34/ Ibid., p. 20.

35/ Thomas Berger, Village Journey. A Report of the Alaska Native Review Commission (New York, Hill & Wang, 1985).

36/ See e.g. John F. Walsh, "Settling the Alaska Native Claims Settlement Act", in Stanford Law Review 38 (1985), pp. 227-263.

37/ Quoted from Information Sheet No. 1, Department of Indian Affairs and Northern Development (DIAND), February 1989; see also DIAND, Comprehensive Land Claims Policy (Ottawa: Minister of Supply and Services, 1987).

38/ Information Sheet No. 8, Department of Indian Affairs and Northern Development, March 1989. See also Richard C. Daniel, A History of Native Claims Processes in Canada, 1867-1979 (Ottawa, DIAND, 1980).

39/ Billy Diamond, "Village of the dammed. The James Bay Agreement leaves a trail of broken promises", in IWGIA Newsletter 1 (1991), p. 43.

40/ See Robert Mainville, "Visions divergentes sur la compréhension de la Convention de la Baie James et du Nord Québecois", in Recherches amérindiennes au Québec XXIII (1) (1993), p. 75.

41/ See Albert Malouf, La Baie James indienne. (Montréal, Ed. du Jour, 1973).

42/ Hans Pavia Rosing, "National land claims: assessing the Alaskan experience", in Native Power (J. Brosted Ed.) (Bergen, Universitetsforlaget, 1985), p. 313.

43/ Quoted from a recent edition of the James Bay and Northern Québec Agreement (Les Publications du Québec, 1991).

44/ Jean-Maurice Morisset, "Le complexe de la Baie James ou l'escamotage d'une dette", in Ethnies 13 (1991), p. 33.

45/ Mainville, op. cit., p. 76.

46/ See Philip Raphals, "The hidden cost of Canada's cheap power", in New Scientist 1808 (1992), pp. 50-54.

47/ Diamond, op. cit., p. 44.

48/ Document E/CN.4/Sub.2/AC.4/1996/6, para. 86.

49/ Quoted from Information Sheet No. 1, Department of Indian Affairs and Northern Development (February 1989).

50/ See Alternative Funding Arrangements: A Guide (Ottawa: Minister of Supply and Services, 1986).

51/ Task Force to Review Comprehensive Claims Policy, Living Treaties, Lasting Agreements (Ottawa, Minister of Supply and Services, 1985), pp. 5-6. A good illustration of the indigenous viewpoints and traditions regarding treaties is provided in the Report of the National Treaty Gathering held in November 1995 in Winnipeg under the auspices of the Assembly of First Nations.

52/ Michael Asch and Patrick Macklem, "Aboriginal rights and Canadian sovereignty: an essay on R. v. Sparrow", in Alberta Law Review XXIX (2) (1991), p. 516.

53/ Patricio Daza, Ethnies et révolution (Kyon and Geneve, Education et Libération, Editions Que Faire?, 1992).

54/ Daza, op. cit., p. 39.

55/ James Howe, "An ideological triangle: the struggle over San Blas culture, 1915-1925", in Nation-states and Indians in Latin America (G. Urban and J. Sherzer, Eds.) (Austin, University of Texas Press, 1991), p. 20.

56/ Marie Léger, "L'autonomie gouvernementale des Kuna du Panama", in Des peuples enfin reconnus: la quéte de l'autonomie dans les Amériques (Montréal, Editions Ecosociété, 1994), pp. 163-207.

57/ See the intervention of COCNAIA/Consejo Coordinador de Naciones Indias de Argentina before the Working Group on Indigenous Peoples in 1988.

58/ See Vicente Sierra, Historia de la Argentina (Buenos Aires, Scientifico Argentina, 1967), pp. 216-258.

59/ Francisco Frias Valenzuela, Historia de Chile, Tomo I: Los origenes (Santiago, Edición Nacimiento, 1959), p. 253.

60/ Sergio Villalobos, "Guerra y paz en la Araucanía: periodificación", in Araucanía: temas de historia fronteriza (Temuco, Edición Universidad de la Frontera, 1989), p. 33.

61/ See Holdenis Casanova Guarda, Las rebeliones araucanas del siglo XVIII: mito y realidad (Temuco, Edición Universidad de la Frontera, 1987); Maria Mendez Beltrán, "La organización de los parlamentos de Indios en el siglo XVIII", in Relaciones fronterizas en la Araucanía (S. Villalobos et al. Ed.) (Santiago, Edición Universidad Católica, 1982), pp. 107-173.

62/ José Bengoa, Historia del pueblo Mapuche (Santiago, Edición Sur, 1985), p. 35.

63/ Ibid., p. 164.

64/ Ibid., pp. 137-138.

65/ Ibid., pp. 173-174.

66/ Isi Foighel, "Home rule in Greenland", in Nordisk Tidsskrift for International Rel, vol. 48 (1979), p. 4.

67/ Gudmundur Alfredsson, "Greenland and the law of political decolonization", in German Yearbook of International Law, vol. 25 (1982), p. 300.

68/ Lejo Sibbel, Greenland Home Rule (Geneva, roneo, 1995), p. 2.

69/ The Case concerning the Legal Status of Greenland (The Hague, Permanent Court of International Justice, Ser. A/B No. 53, 1933), p. 44, cited in Sibbel, op. cit., p. 3.

70/ The Committee's report was published in Copenhagen in 1921. See Alfredsson, op. cit., p. 300, note 22.

71/ Alfredsson, op. cit., p. 306.

72/ Henriette Rasmussen, "Temas de actualidad del pueblo inuit", in Asuntos indígenas 3 (julio/agosto/setiembre 1995), p. 48.

73/ Rasmussen, op. cit., p. 49.

74/ Rasmussen, op. cit., p. 49.

75/ Rasmussen, op. cit., p. 49.